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vii

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x1

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ABBREVIATIONS OF COMMISSION REPORTS.

- Ann. Proc. Nat. Asso. R. Annual Proceedings of the National Association of Railway Commissioners.
- Ann. Rep. Ala. R. C. Annual Report of the Alabama Railroad Commission.
- " " Ariz. C. C. Annual Report of the Arizona Corporation Commission.
- " " Ariz. R. C. Arizona Railway Commission Annual Reports. 1909-10.
- " " Ark. R. C. Arkansas Railroad Commission Annual Reports.
- " " Cal. Bd. R. Co. California Board of Railroad Commissioners. Annual Reports.
- " " Can. R. C. Board of Railway Commissioners of Canada. Annual Reports.
- " " Colo. P. U. C. Annual Report of the Colorado Public Utilities Commission.
- " " Col. S. R. C. Colorado State Railroad Commission Annual Reports. 1907-14.
- " " Conn. P. U. C. Annual Report of the Connecticut Public Utilities Commission.
- " " Conn. R. C. Annual Report of the Connecticut Railroad Commissioners. 1853-1911.
- " " Dist. Col. P. U. C. Annual Report of the District of Columbia Public Utilities Commission.
- " " Fla. R. C. Annual Report of the Railroad Commission for the State of Florida.
- " " Ga. R. C. Annual Report of the Railroad Commission of Georgia.
- " " Houston, Tex., P. S. C. Houston, Texas, Public Service Commissioner. Annual Reports.
- " " Ia. R. C. Annual Report of the Iowa Board of Railroad Commissioners.
- " " Id. P. U. C. Annual Report of the Idaho Public Utilities Commission.
- " " Ill. P. U. C. Annual Report of the Public Utilities Commission of Illinois.
- " " Ill. R. & W. C. Annual Report of the Illinois Railroad and Warehouse Commission. 1871-1913.
- " " Ind. P. S. C. Annual Report of the Indiana Public Service Commission.

ABBREVIATIONS.

xv

- Ann. Rep. Ind. R. C. Annual Report of the Railroad Commission of Indiana. 1906-1912.
" " Kan. R. C. Annual Report of the Railroad Commissioners of Kansas.
" " Ky. R. C. Annual Report of the Kentucky Railroad Commission.
" " La. R. C. Annual Report of the Railroad Commission of Louisiana.
" " Los Angeles Bd. P. U. Los Angeles, Cal., Board of Public Utilities Annual Reports. 1909-1913.
" " Manitoba P. U. C. Manitoba Public Utilities Commission, Canada, Annual Reports.
" " Mass. G. & E. L. C. Annual Report of the Massachusetts Board of Gas and Electric Light Commissioners.
" " Mass. High Com. Annual Report of the Massachusetts Highway Commission. (Tel. Cos.)
" " Mass. P. S. C. Annual Report of the Massachusetts Public Service Commission.
" " Mass. R. C. Annual Report of the Massachusetts Board of Railroad Commissioners.
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GENERAL TABLE OF CASES REPORTED.

See also list of Appeals, Rehearings, and Modifications, post, p. xlviii.

- | | | |
|--|------------------------------|-----|
| Akers and Diehl, Re | (Mo.) (abstract) | 253 |
| Alabama Great Southern R. Co., Alabama T. & N. R. Corp. v. | (3 cases) (Ala.) (abstract) | 532 |
| Alabama Power Co., Re | (Ala.) | 383 |
| Alabama Pub. Service Commission, St. Louis-S. F. R. Co. v. | (U. S. Dist. Ct.) | 613 |
| Alabama T. & N. R. Corp. v. Alabama Great Southern R. Co. | (3 cases) (Ala.) (abstract) | 532 |
| Albers Bros. Milling Co., Re | (Cal.) (abstract) | 253 |
| Allen, Birmingham Electric Co. v. | (Ala. Sup. Ct.) (abstract) | 367 |
| Alton Transp. Co., Re. See Chicago & J. Transp. Co., Re | | 481 |
| American Indian Oil & Gas Co., Re | (Okla.) (abstract) | 377 |
| Anchor Coal Co. v. United States (2 cases) | (U. S. Dist. Ct.) (abstract) | 195 |
| Anchor Coal Co. v. United States | (U. S. Dist. Ct.) (abstract) | 197 |
| Anderson, Bay and River Boat Owners' Asso. v. | (Cal.) | 86 |
| Anderson, Coulter v. | (Cal.) (abstract) | 138 |
| Andover Water Co., Re | (Me.) (abstract) | 664 |
| Andover Water Co., Re | (Me.) (abstract) | 669 |
| Androscoggin & K. R. Co., Re | (Me.) | 347 |
| Antisdel v. Macatawa Resort Co. | (Mich. Sup. Ct.) | 606 |
| Apache R. Co., Arizona Box Co. v. | (Ariz.) (abstract) | 378 |
| Argos Teleph. Co., Re | (Ind.) | 271 |
| Arizona Box Co. v. Apache R. Co. | (Ariz.) (abstract) | 378 |
| Arizona Eastern R. Co., Arizona Packing Co. v. | (Ariz.) (abstract) | 202 |
| Arizona Packing Co. v. Arizona Eastern R. Co. | (Ariz.) (abstract) | 202 |
| Armstrong Water Co., Kittanning v. | (Pa.) (abstract) | 669 |
| Arthaud v. Oregon-Washington R. & Nav. Co. | (Wash.) (abstract) | 202 |
| Arvada Electric Co., Re | (Colo.) | 471 |
| Asbury Truck Co., Re | (Cal.) (abstract) | 133 |
| Atchison, T. & S. F. R. Co., Re | (N. M.) (abstract) | 571 |
| Atchison, T. & S. F. R. Co., Illinois Coal Traffic Bureau v. | (Ill.) (abstract) | 198 |
| Atchison, T. & S. F. R. Co., Illinois Coal Traffic Bureau v. (2 cases) | (Ill.) (abstract) | 201 |
| Atchison, T. & S. F. R. Co., Pacific Cottonseed Products Corp. v. | (Cal.) (abstract) | 201 |
| Atwill, Cambridge Electric Light Co. v. | (U. S. Dist. Ct.) | 253 |
| Auto Tours Continental Club, California Transit Co. v. | (Cal.) (abstract) | 551 |

- Auto Transp. Co., Re (Wis.) (abstract) 199
 Bacon Service Corp., Re (Cal.) (abstract) 137
 Baird, Re (Mo.) (abstract) 133
 Bakersfield & Los Angeles Fast Freight Co. v. Gombos (Cal.) (abstract) 137
 Bakersfield & Los Angeles Fast Freight Co. v. Willhour
 (Cal.) (abstract) 251
 Baldwin v. Chesapeake & P. Teleph. Co. (Md.) 529
 Balish, Re (Cal.) (abstract) 136
 Baltimore & O. R. Co., Re (Ohio) (abstract) 567
 Baltimore & O. R. Co., Re (5 cases) (Ohio) (abstract) 571
 Baltimore & O. R. Co., Re (Ohio) (abstract) 577
 Baltimore & O. R. Co., County Comrs. of Clark County v.
 (Ind.) (abstract) 567
 Bay and River Boat Owners' Asso. v. Anderson (Cal.) 86
 Beaver Dam v. Wisconsin Power & Light Co. (Wis.) (abstract) 664
 Beaver Dam v. Wisconsin Power & Light Co. (Wis.) (abstract) 666
 Bell v. Harlan (U. S. C. C. A.) (abstract) 251
 Bell v. Harlan (U. S. C. C. A.) (abstract) 259
 Bell Teleph. Co., Re (Can.) (abstract) 665
 Bell Teleph. Co., Re (Can.) (abstract) 667
 Benton Harbor-St. Joe R. & Light Co., Gilmore Bros. v.
 (Mich.) (abstract) 200
 Berkeley, Re (Cal.) (abstract) 574
 Berton, Re (Conn.) (abstract) 368
 Birmingham Electric Co. v. Allen (Ala. Sup. Ct.) (abstract) 367
 Board of Estimate and Apportionment, Re (N. Y. T. C.) (abstract) 570
 Board of Supervisors of Kern County, Re (Cal.) (abstract) 574
 Board of Trade Warehouse Corp., Re (Ill.) 65
 Boston & M. R. Co., Re (N. H.) (abstract) 577
 Boston & M. R. Co., Collette v. (N. H. Sup. Ct.) (abstract) 577
 Boyd v. Union Electric Light & P. Co. (Mo.) 266
 Brownsville Water Co., Pishnery v. (Pa.) (abstract) 534
 Brubaker v. Millersburg Home Water Co. (Pa.) (abstract) 669
 Bunceton Chamber of Commerce v. Missouri P. R. Co. (Mo.) (abstract) 369
 Bunker Hill Teleph. Co., Re (Ill.) (abstract) 667
 Burbank, Re (Cal.) (abstract) 574
 Bureau of Lighthouses v. Southern Pub. Utilities Co. (N. C.) 307
 Burtman Iron & Wire Works, Re (Mass.) (abstract) 200
 Buster, Re (Colo.) (abstract) 199
 Buster, Re (3 cases) (Colo.) (abstract) 375
 Butte-Virginia City Freight Service, Re (2 cases) (Mont.) (abstract) 375
 Butte-Virginia City Freight Service, Re (Mont.) (abstract) 552
 Cale and Smith v. Jamestown Teleph. Corp. (N. Y.) 276
 California Cattlemen's Asso. v. Minarets & W. R. Co. (2 cases)
 (Cal.) (abstract) 198
 California R. Commission, Los Angeles R. Corp. v. (U. S. Dist. Ct.) 584
 California Transit Co. v. Auto Tours Continental Club
 (Cal.) (abstract) 551
 Cambridge, Re (Wis.) 707

- Cambridge Electric Light Co. v. Atwill (U. S. Dist. Ct.) 253
 Camden v. Lehigh Valley R. Co. (N. Y.) (abstract) 371
 Caplan, Re (N. H.) (abstract) 249
 Caplan, Re (N. H.) (abstract) 552
 Capron, Board of County Comrs. of Weld County v. (Colo.) (abstract) 251
 Carpenter, Re (Cal.) (abstract) 137
 Carroll & Fox, Mushroom Transp. Co. v. (Pa.) (abstract) 376
 Cato v. Lehigh Valley R. Co. (N. Y.) (abstract) 371
 Cayee, Re (Mo.) 316
 Central Illinois Pub. Service Co., Re (Ill.) (abstract) 665
 Central Northwest Business Men's Asso. v. Chicago Surface Lines
 (III.) (abstract) 134
 Central Northwest Business Men's Asso. v. Chicago Surface Lines (Ill.) 685
 Central of Georgia Motor Transport Co., Re (Ala.) 535
 Chehalis & Boistfort Teleph. Co., Department of Public Works v.
 (Wash.) (abstract) 669
 Chesapeake & P. Teleph. Co., Baldwin v. (Md.) 529
 Chicago & J. Transp. Co., Re (Ill.) 481
 Chicago & W. T. R. Co., Re. See Chicago & J. Transp. Co.; Re 481
 Chicago, B. & Q. R. Co., Polenske Bros.-Schellak & Co. v.
 (Neb.) (abstract) 203
 Chicago, I. & L. R. Co., Re (Ind.) (abstract) 367
 Chicago, I. & L. R. Co., Re (Ind.) (abstract) 369
 Chicago, M. & St. P. R. Co., Clermont Township v. (N. D.) (abstract) 535
 Chicago, M. & St. P. R. Co., Clermont Township v. (2 cases)
 (N. D.) (abstract) 573
 Chicago, M. & St. P. R. Co., United Commercial Travelers of America v.
 (S. D.) (abstract) 379
 Chicago, M. & St. P. & P. R. Co., Re (3 cases) (Wis.) (abstract) 374
 Chicago, R. I. & P. R. Co., Re (Neb.) (abstract) 203
 Chicago, R. I. & P. R. Co., Department of Public Works and Buildings,
 Division of Highways v. (Ill.) (abstract) 570
 Chicago, R. I. & P. R. Co., Department of Public Works and Buildings,
 Division of Highways v. (Ill.) (abstract) 572
 Chicago, S. S. & S. B. R. Co., Re (Ind.) (abstract) 136
 Chicago, St. P. M. & O. R. Co., Re (Minn.) (abstract) 576
 Chicago Surface Lines, Central Northwest Business Men's Asso. v.
 (III.) (abstract) 134
 Chicago Surface Lines, Central Northwest Business Men's Asso. v.
 (III.) 685
 Chichizola Estate Co., Re (Cal.) (abstract) 370
 Chinook Water Works, Department of Public Works v.
 (Wash.) (abstract) 382
 Chinook Water Works, Department of Public Works v.
 (Wash.) (abstract) 666
 Cincinnati & Suburban Bell Teleph. Co., Re (Ohio) (abstract) 668
 Citizens Committee of Summit Hill v. East Penn Electric Co. (Pa.) 288
 Clarksburg Light & Heat Co., Re (W. Va.) 728
 Clarks Summit Water Co., Hall v. (Pa.) (abstract) 669

- Clark v. Utica Gas & E. Co.** (N. Y. App. Div.) 657
Clermont Township v. Chicago, M. & St. P. R. Co. (N. D.) (abstract) 535
Clermont Township v. Chicago, M. & St. P. R. Co. (2 cases)
 (N. D.) (abstract) 573
Cochran, Re (Cal.) (abstract) 138
Collette v. Boston & M. R. Co. (N. H. Sup. Ct.) (abstract) 577
Colonial Motor Coach Corp. v. Oswego ... (N. Y. Sup. Ct.) (abstract) 259
Colorado & S. R. Co., Re (Colo.) (abstract) 373
Colorado Cab Co., Re (Colo.) (abstract) 368
Colorado Cab Co., Re (5 cases) (Colo.) (abstract) 375
Colorado Cab Co., Re (Colo.) (abstract) 532
Columbia R. Gas & E. Co. v. South Carolina (U. S. C. C. A.) 235
Columbia River Teleph. Co. v. Department of Public Works
 (Wash. Sup. Ct.) 520
Comfort, Department of Public Works ex rel. Patrons v.
 (Wash.) (abstract) 669
Commonwealth Teleph. Co., Re (Wis.) (abstract) 251
Commonwealth Teleph. Co., Re (Wis.) (abstract) 368
Commonwealth Teleph. Co., Unbehauen v. (Wis.) (abstract) 207
Condos, Re (Cal.) (abstract) 575
Consolidated Gas Co., Re (N. Y.) 19
Consolidated Gas Co., Re (N. Y.) 478
Continental Teleph. Co., Re (Neb.) (abstract) 206
Conyngham v. Conyngham Water Co. (Pa.) (abstract) 208
Conyngham Water Co., Conyngham v. (Pa.) (abstract) 208
Coronado Transfer v. United Parcel Service (2 cases) (Cal.) (abstract) 250
Coulter v. Anderson (Cal.) (abstract) 138
County Comrs. of Clark County v. Baltimore & O. R. Co.
 (Ind.) (abstract) 567
County Comrs. of Kit Carson County, Re (Colo.) (abstract) 576
County Comrs. of Oklahoma County v. MKT R. Co. (Okla.) (abstract) 571
County Comrs. of Weld County v. Capron (Colo.) (abstract) 251
Courville, Re (Mont.) (abstract) 553
Craig, Re (Colo.) 60
Cripple Creek v. Cripple Creek Water Co. (Colo.) 388
Cripple Creek Water Co., Cripple Creek v. (Colo.) 388
C. T. & N. Teleph. Co., Re (Ill.) (abstract) 206
Cudahy Packing Co. v. Omaha (U. S. C. C. A.) (abstract) 195
Cudahy Packing Co. v. Omaha (U. S. C. C. A.) (abstract) 210
Dakota Central Teleph. Co., Southwest Branch of Rural Reciprocal
 Teleph. Co. v. (S. D. Sup. Ct.) 757
Dallas Chamber of Commerce v. Texas Carriers (Tex.) (abstract) 202
Danville-Terre Haute Ltd. Bus Co., Re (Ind.) (abstract) 138
Darnielle, Re (Idaho) 211
Davidson v. Mount Albert Teleph. Co. (Can.) (abstract) 533
Davis & Bunker, Re (Wash.) (abstract) 376
Dearborn v. Midwest Teleph. Co. (Mo.) 175
Decatur County Independent Teleph. Co., Re (Ind.) 1
Decatur County Independent Teleph. Co., Re (Ind.) (abstract) 198

CASES REPORTED.

xxiii

- | | | |
|--|--------------------|-----|
| Decatur County Independent Teleph. Co., Re | (Ind.) (abstract) | 667 |
| DeKalb-Ogle Teleph. Co., Polo Teleph. Co. v. | (Ill.) | 696 |
| Delta Teleph. & Teleg. Co., Re | (Cal.) (abstract) | 665 |
| Denver & Salt Lake R. Co., Hitchock & Tinkler Equipment Co. v. | | |
| | (Colo.) | 681 |
| Denver & Salt Lake R. Co., Moffat Tunnel Improv. Dist. v. | (Colo.) | 681 |
| Department of Public Works and Buildings, Division of Highways v. | | |
| Chicago, R. I. & P. R. Co. | (Ill.) (abstract) | 570 |
| Department of Public Works and Buildings, Division of Highways v. | | |
| Chicago, R. I. & P. R. Co. | (Ill.) (abstract) | 572 |
| Department of Public Works v. Chehalis & Boistfort Teleph. Co. | | |
| | (Wash.) (abstract) | 669 |
| Department of Public Works v. Chinook Water Works | | |
| | (Wash.) (abstract) | 382 |
| Department of Public Works v. Chinook Water Works | | |
| | (Wash.) (abstract) | 666 |
| Department of Public Works, Columbia River Teleph. Co. v. | | |
| | (Wash. Sup. Ct.) | 520 |
| Department of Public Works ex rel. Asotin v. Pacific Power & Light | | |
| Co. | (Wash.) | 213 |
| Department of Public Works ex rel. Deer Park v. Mount Spokane | | |
| Power Co. (2 cases) | (Wash.) (abstract) | 377 |
| Department of Public Works ex rel. Deer Park v. Mount Spokane | | |
| Power Co. | (Wash.) (abstract) | 667 |
| Department of Public Works ex rel. Friday Harbor v. Friday Harbor | | |
| Light & P. Co. | (Wash.) | 660 |
| Department of Public Works ex rel. Morton v. Morton Electric Co. | | |
| | (Wash.) (abstract) | 377 |
| Department of Public Works ex rel. Patrons v. Comfort | | |
| | (Wash.) (abstract) | 669 |
| Department of Public Works ex rel. Patrons v. Easton Water System | | |
| | (Wash.) (abstract) | 670 |
| Department of Public Works ex rel. Patrons v. Republic Water Co. | | |
| | (Wash.) (abstract) | 670 |
| Department of Public Works ex rel. Patrons v. Westminster Water | | |
| Works | (Wash.) (abstract) | 670 |
| DeSalme v. Union Electric Light & P. Co. | (Mo.) | 310 |
| Detchon, Re | (Ind.) (abstract) | 667 |
| Diamond Ridge Water Co., Re | (Cal.) (abstract) | 200 |
| Didriksen, Re | (Mont.) (abstract) | 376 |
| Diehl, Re | (Colo.) (abstract) | 134 |
| Dixfield Light & Water Co. v. Itself | (Me.) (abstract) | 664 |
| Dixfield Light & Water Co. v. Itself | (Me.) (abstract) | 665 |
| Duggan, Re | (Cal.) (abstract) | 138 |
| Eagle River, Minoequa v. | (Wis.) | 208 |
| Eagle River Water & Light Commission, Johnson v. (Wis.) (abstract) | | 369 |
| Eagle River Water & Light Commission, Johnson v. (Wis.) (abstract) | | 377 |
| Easton Water System, Department of Public Works ex rel. Patrons v. | | |
| | (Wash.) (abstract) | 670 |

- | | |
|---|---------------------------------|
| East Penn Electric Co., Citizens Committee of Summit Hill v. (Pa.) | 288 |
| East Penn Electric Co., Lansford v. | (Pa.) 288 |
| East St. Louis Light & P. Co., Illinois Commerce Commission v. | |
| (Ill.) (abstract) | 200 |
| Electric Pub. Utilities Co. v. Public Service Commission (Md. Cir. Ct.) | 854 |
| Elwood Water Co., Re | (Ind.) 699 |
| Empire Oil Co. v. Jamestown Teleph. Corp. | (N. Y.) 276 |
| Erb v. Public Service Commission | (Pa. Super. Ct.) (abstract) 252 |
| Erie & Wyoming Valley R. Co., Freas v. (2 cases) .. | (Pa.) (abstract) 368 |
| Erie & Wyoming Valley R. Co., Freas v. | (Pa.) (abstract) 379 |
| Erie & Wyoming Valley R. Co., Freas v. | (Pa.) (abstract) 533 |
| Exhibitors Film Delivery & Service Co., Re | (Colo.) 623 |
| Extensions of Electric Service, Re | (Ind.) 517 |
| Farmers' & Merchants' Teleph. Co. v. Orleans Community Club | |
| (Neb. Sup. Ct.) | 787 |
| Farmers Co-op. Grain & Lumber Co. v. Minneapolis & St. L. R. Co. | |
| (Iowa) (abstract) | 534 |
| Farmers Mut. Teleph. Co., Re | (Neb.) (abstract) 206 |
| Farmers Teleph. Co., Re | (Neb.) (abstract) 534 |
| Film Transport Co. v. Michigan Pub. Utilities Commission | |
| (U. S. Dist. Ct.) (abstract) | 252 |
| Fireproof Warehouse & Storage Co., Re | (Ohio) (abstract) 199 |
| Flintridge Motor Co., Re | (Cal.) (abstract) 134 |
| Fountain City Teleph. Co., Re | (Wis.) (abstract) 381 |
| Freas v. Erie & Wyoming Valley R. Co. (2 cases) .. | (Pa.) (abstract) 368 |
| Freas v. Erie & Wyoming Valley R. Co. | (Pa.) (abstract) 379 |
| Freas v. Erie & Wyoming Valley R. Co. | (Pa.) (abstract) 533 |
| Freeman Teleph. Co., Re | (Wis.) (abstract) 197 |
| Friday Harbor Light & P. Co., Department of Public Works ex rel. | |
| Friday Harbor v. | (Wash.) 660 |
| Frost & Co., Re (2 cases) | (Cal.) (abstract) 250 |
| Gadberry Transp. Co., Re. See Chicago & J. Transp. Co., Re | 481 |
| G. & W. Garage and Tours Co., Re | (Colo.) 64 |
| Garrison, Shepherd v. | (Mo.) (abstract) 138 |
| Genesee & Wyoming R. Co., Re (2 cases) | (N. Y.) (abstract) 367 |
| Genesee & Wyoming R. Co., Re (3 cases) | (N. Y.) (abstract) 370 |
| Genesee & Wyoming R. Co., Re | (N. Y.) (abstract) 533 |
| Gilboy, Hare v. | (Cal.) (abstract) 250 |
| Gilmer v. Great Northern R. Co. | (Minn.) (abstract) 378 |
| Gilmore Bros. v. Benton Harbor-St. Joe R. & Light Co. | |
| (Mich.) (abstract) | 200 |
| Glacier Route, Re | (Colo.) (abstract) 552 |
| Gloucester Township, Re | (N. J.) (abstract) 567 |
| Gombos, Bakersfield & L. A. Fast Freight Co. v. | (Cal.) (abstract) 137 |
| Gonzales v. Southern Bell Teleph. & Teleg. Co. (2 cases) | |
| (La.) (abstract) | 368 |
| Gould v. Public Service Electric & Gas Co. | (N. J.) 321 |
| Great Falls Gas Co., Re | (Mont.) 803 |
| Great Northern R. Co., Gilmer v. | (Minn.) (abstract) 378 |

- | | | |
|---|------------------------------|------------------------|
| Great Northern R. Co., State v. | (N. D. Sup. Ct.) | 111 |
| Great Northern R. Co., Yale v. | (S. D.) (abstract) | 379 |
| Gregg v. Terre Haute | (Ind.) (abstract) | 553 |
| Groton & Stonington Traction Co., Re | (Conn.) (abstract) | 380 |
| Hall v. Clarks Summit Water Co. | (Pa.) (abstract) | 669 |
| Hall, Standard Oil Co. v. | (U. S. Dist. Ct.) (abstract) | 251 |
| Hammond v. Hammond, W. & E. C. R. Co. | (Ind.) | 577 |
| Hammond, W. & E. C. R. Co., Hammond v. | (Ind.) | 577 |
| Hare v. Gilboy | (Cal.) (abstract) | 250 |
| Harlan, Bell v. | (U. S. C. C. A.) (abstract) | 251 |
| Harlan, Bell v. | (U. S. C. C. A.) (abstract) | 250 |
| Hartford v. New York, N. H. & H. R. Co. | (Conn.) | 556 |
| Hazard, Re | (Cal.) (abstract) | 138 |
| Henderson County Pub. Service Co., Re | (Ill.) (abstract) | 190 |
| Henderson County Pub. Service Co., Re | (Ill.) (abstract) | 199 |
| Henshaw, People's Transit Co. v. | (U. S. C. C. A.) (abstract) | 256 |
| Hewett, Re | (S. D.) (abstract) | 374 |
| Hi-Ball Transit Co. v. Texas Railroad Commission | (U. S. Dist. Ct.) | 103 |
| Himmelman v. Southern Wisconsin Electric Co. ... | (Wis.) (abstract) | 198 |
| Hitchcock & Tinkler Equipment Co. v. Denver & Salt Lake R. Co. | | (Colo.) 681 |
| Home Teleph. Co., Re | (Cal.) (abstract) | 206 |
| Horn & Hardart Baking Co. v. Public Service Electric & Gas Co. (N. J.) | | 513 |
| Illinois Bell Teleph. Co., Re | | 275 |
| Illinois Bell Teleph. Co., Illinois Commerce Commission v. | | (Ill.) (abstract) 533 |
| Illinois Coal Traffic Bureau v. Atchison, T. & S. F. R. Co. | | (Ill.) (abstract) 198 |
| Illinois Coal Traffic Bureau v. Atchison, T. & S. F. R. Co. (2 cases) | | (Ill.) (abstract) 201 |
| Illinois Commerce Commission v. East St. Louis Light & P. Co. | | (Ill.) (abstract), 200 |
| Illinois Commerce Commission v. Illinois Bell Teleph. Co. | | (Ill.) (abstract) 533 |
| Illinois Commerce Commission v. Teutopolis Teleph. Co. | | (Ill.) (abstract) 667 |
| Illinois C. R. Co. v. Meyer (2 cases) | (Iowa) (abstract) | 572 |
| Illinois Motor Coach Co., Re. See Chicago & J. Transp. Co., Re | | 481 |
| Illinois Power & Light Corp., Re (3 cases) | (Ill.) (abstract) | 204 |
| Illinois Power Co., Re | (Ill.) (abstract) | 204 |
| Illinois Traction, Re. See Chicago & J. Transp. Co., Re | | 481 |
| Independence Water Works Co., Lee's Summit v. | (Mo.) | 184 |
| Indianapolis Power & Light Co., Re | (Ind.) (abstract) | 367 |
| Indiana Service Corp., Re | (Ind.) (abstract) | 380 |
| Indiana Teleph. & Teleg. Co., Re | (Ind.) (abstract) | 664 |
| Inter-City Motor Transp. Co., Re. See Chicago & J. Transp. Co., Re | | 481 |
| Iowa Light, Heat & P. Co., Sac City v. | (Iowa Sup. Ct.) (abstract) | 259 |
| Iron River v. Northland Transp. Co. (3 cases) ... | (Wis.) (abstract) | 376 |
| Itself, Dixfield Light & Water Co. v. | (Me.) (abstract) | 664 |

- Itself, Dixfield Light & Water Co. v. (Me.) (abstract) 665
 Itself, Kingfield Water Co. v. (Me.) (abstract) 669
 Jackson County v. Missouri P. R. Co. (2 cases) ... (Mo.) (abstract) 572
 Jamestown Teleph. Corp., Cale and Smith v. (N. Y.) 276
 Johnson v. Eagle River Water & Light Commission (Wis.) (abstract) 369
 Johnson v. Eagle River Water & Light Commission (Wis.) (abstract) 377
 Joplin Water Works Co., Roger Iron Works Co. v. (Mo.) 260
 Kansas Gas & E. Co., Wichita v. (Kan.) 634
 Kaufman & Sons Co. v. Wharton & N. R. Co. (N. J.) (abstract) 203
 Keene Electric R. Co., Re (N. H.) (abstract) 577
 Kingfield Water Co. v. Itself (Me.) (abstract) 669
 Kittanning v. Armstrong Water Co. (Pa.) (abstract) 669
 Klinkenstein v. Third Avenue R. Co. (N. Y. Ct. App.) (abstract) 133
 Klinkenstein v. Third Avenue R. Co. (N. Y. Ct. App.) (abstract) 249
 Lande v. Napa Ranch (Cal.) (abstract) 250
 Lansford v. East Penn Electric Co. See Citizens Committee of Summit
 Hill v. East Penn Electric Co. 288
 Laporte County Indiana Teleph. Co., Re (Ind.) (abstract) 668
 Lebanon Teleph. Co., Re (Wis.) (abstract) 381
 Lee's Summit v. Independence Water Works Co. (Mo.) 184
 Legislative Joint Resolution No. 59, Re (Wis.) (abstract) 568
 Lehigh Valley R. Co., Camden v. (N. Y.) (abstract) 371
 Lehigh Valley R. Co., Cato v. (N. Y.) (abstract) 371
 Lehigh Valley R. Co. v. Public Utility Comrs. (3 cases)
 (N. J. Sup. Ct.) (abstract) 567
 Leland, Re (Okla.) (abstract) 197
 Lexington Water Co., Re (Mo.) 322
 Lincoln Teleph. & Teleg. Co., Re (Neb.) (abstract) 367
 Lincoln Teleph. & Teleg. Co., Re (Neb.) (abstract) 381
 Lishon, Pejepscot Paper Co. v. (3 cases)
 (Me. Sup. Jud. Ct.) (abstract) 207
 Logan City v. Utah Power & Light Co. (Utah) 57
 Logansport Home Teleph. Co., Re (Ind.) 714
 Long Beach Water Co., Re (N. J.) (abstract) 382
 Long Island R. Co., Re (N. Y. T. C.) (abstract) 573
 Los Altos Water Co., Re (Cal.) (abstract) 669
 Los Angeles, Re (Cal.) (abstract) 575
 Los Angeles & S. L. R. Co., Van Camp Sea Food Co. v.
 (Cal.) (abstract) 198
 Los Angeles R. Corp. v. California R. Commission (U. S. Dist. Ct.) 584
 Louisiana Pub. Service Commission v. Texas & N. O. R. Co. (2 cases)
 (La.) (abstract) 378
 Macatawa Resort Co., Antisdel v. (Mich. Sup. Ct.) 606
 MacDonald, Re (Mass.) 789
 Macke v. Union Electric Light & P. Co. (2 cases) ... (Mo.) (abstract) 372
 Madison Gas & E. Co., Re (Wis.) 601
 Makin v. Missouri Pub. Service Commission (Mo.) 290
 Mamaroneck v. New York Interurban Water Co.
 (N. Y. Sup. Ct.) (abstract) 259

- Martinsville Teleph. Co., Re (Ind.) 553
 Marysville, Re (Cal.) (abstract) 569
 Mayor and Aldermen of Jersey City, Re (N. J.) (abstract) 379
 Mayor of Grandview v. Missouri Pub. Service Commission (Mo.) 290
 McBride, Ribnik v. (2 cases) (U. S. Sup. Ct.) (abstract) 252
 McConnel, Re (Cal.) (abstract) 551
 McGann, Re (Cal.) (abstract) 138
 McGeoghegan, Re (Cal.) (abstract) 134
 McIndoe, Re. See Smith River Power Co., Re 96
 McMahon v. Nickel Plate Road (Ind.) (abstract) 535
 Merchants Asso. of Shenandoah v. Schuylkill R. Co. (Pa.) (abstract) 667
 Meyer, Illinois C. R. Co. v. (2 cases) (Iowa) (abstract) 572
 Michigan Pub. Utilities Commission, Film Transport Co. v.
 (U. S. Dist. Ct.) (abstract) 252
 Middlesex, Re (N. J.) (abstract) 205
 Middle States Teleph. Co., Re (Ill.) (abstract) 664
 Middleton-Madison Motor Coach Co., Re (Wis.) (abstract) 199
 Midwest Teleph. Co., Dearborn v. (Mo.) 175
 Millersburg Home Water Co., Brubaker v. (Pa.) (abstract) 669
 Milwaukee Electric R. & Light Co., Re (Wis.) 15
 Milwaukee Electric R. & Light Co., Milwaukee v. (Wis.) (abstract) 380
 Milwaukee Electric R. & Light Co., Milwaukee v. (Wis.) 679
 Milwaukee v. Milwaukee Electric R. & Light Co. (Wis.) (abstract) 380
 Milwaukee v. Milwaukee Electric R. & Light Co. (Wis.) 679
 Minarets & W. R. Co., California Cattlemen's Asso. v. (2 cases)
 (Cal.) (abstract) 198
 Minerva-Canton Transit Co. v. Public Utilities Commission
 (Ohio Sup. Ct.) 130
 Minneapolis & St. L. R. Co., Farmers Co-op. Grain & Lumber Co. v.
 (Iowa) (abstract) 534
 Minocqua v. Eagle River (Wis.) 208
 Missouri Gas & Electric Service Co., Public Service Commission v.
 (Mo.) (abstract) 666
 Missouri P. R. Co., Re (Mo.) (abstract) 373
 Missouri P. R. Co., Re (Mo.) (abstract) 374
 Missouri P. R. Co., Bunceton Chamber of Commerce v.
 (Mo.) (abstract) 369
 Missouri P. R. Co., Jackson County v. (2 cases) (Mo.) (abstract) 572
 Missouri Pub. Service Commission, Makin v. (Mo.) 290
 MKT R. Co., County Comrs. of Oklahoma County v.
 (Okl.) (abstract) 571
 Moffat Tunnel Improv. Dist. v. Denver & Salt Lake R. Co. See Hitchcock & Tinkler Equipment Co. v. Denver & Salt Lake R. Co. 681
 Mohawk Stage Lines Corp., Re. See Chicago & J. Transp. Co., Re 481
 Monroe, Re (Cal.) (abstract) 196
 Moroni Teleph. Co., Re (Utah) (abstract) 668
 Morton Electric Co., Department of Public Works ex rel. Morton v.
 (Wash.) (abstract) 377
 Motor Freight, Northern Ohio Power & Light Co. v. (Ohio) 609

- Motor Service Express, Re (Cal.) (abstract) 196
 Motor Service Express, Re (Cal.) (abstract) 198
 Motor Vehicle Common Carriers, Re (Ariz.) (abstract) 552
 Mount Albert Teleph. Co., Davidson v. (Can.) (abstract) 533
 Mount Spokane Power Co., Department of Public Works ex rel. Deer Park v. (2 cases) (Wash.) (abstract) 377
 Mount Spokane Power Co., Department of Public Works ex rel. Deer Park v. (Wash.) (abstract) 667
 Mushroom Transp. Co. v. Carroll & Fox (Pa.) (abstract) 376
 Napa Ranch, Lande v. (Cal.) (abstract) 250
 Narbonne Ranche Water Co. No. 2, Re (2 cases) (Cal.) (abstract) 382
 Nashua Street R. Co., Re (N. H.) (abstract) 205
 New Castle Electric Street R. Co., Re (Pa.) (abstract) 371
 New York, Re (2 cases) (N. Y.) (abstract) 568
 New York, Re (N. Y.) (abstract) 576
 New York Interurban Water Co., Mamaroneck v. (N. Y. Sup. Ct.) (abstract) 259
 New York, N. H. & H. R. Co., Re (2 cases) (Conn.) (abstract) 569
 New York, N. H. & H. R. Co., Re (Mass.) 863
 New York, N. H. & H. R. Co., Hartford v. (Conn.) 556
 New York Power & Light Corp., Re (N. Y.) 781
 New York, Rapid Transit Subway Construction Co. v. (N. Y. Sup. Ct.) (abstract) 210
 New York, Subin v. (N. Y. Mun. Ct.) (abstract) 207
 Nickel Plate Road, McMahon v. (Ind.) (abstract) 535
 North Bend Heat, Light, Water & Power Co., North Bend v. (Wash.) (abstract) 666
 North Bend v. North Bend Heat, Light, Water & Power Co. (Wash.) (abstract) 666
 North Dakota Mill & Elevator Asso. v. Great Northern R. Co. (N. D. Sup. Ct.) 111
 Northern Ohio Power & Light Co. v. Motor Freight (Ohio) 609
 Northland Transp. Co., Iron River v. (3 cases) (Wis.) (abstract) 376
 Northwestern Bell Teleph. Co., Re (Neb.) (abstract) 207
 Northwestern Bell Teleph. Co., Re (Neb.) (abstract) 369
 Northwestern Bell Teleph. Co., Re (Neb.) (abstract) 373
 Northwestern Bell Teleph. Co., Re (Neb.) (abstract) 381
 Northwestern Bell Teleph. Co., Re (Neb.) (abstract) 668
 Northwestern Electric Service Co., Re (Pa.) 764
 Northwestern P. R. Co., Western P. R. Co. v. (2 cases) (Cal.) (abstract) 201
 Norway Water Co., Re (Me.) (abstract) 253
 Nuckolls County Independent Teleph. Co., Re (Neb.) (abstract) 207
 Oklahoma-Arkansas Teleph. Co., Re (Okla.) 737
 Omaha & Lincoln R. & Light Co., Re (Neb.) (abstract) 258
 Omaha, Cudahy Packing Co. v. (U. S. C. C. A.) (abstract) 195
 Omaha, Cudahy Packing Co. v. (U. S. C. C. A.) (abstract) 210
 Omaha, Lincoln & Beatrice R. Co., Re (Neb.) (abstract) 370
 Ontario Feed & Milling Co., Re (Cal.) (abstract) 252

- | | | |
|---|-----------------------------|-----|
| Oregon-Washington R. & Nav. Co., Arthaud v. | (Wash.) (abstract) | 202 |
| Orleans Community Club, Farmers' & Merchants' Teleph. Co. v. | (Neb. Sup. Ct.) | 787 |
| Osmond Teleph. Co., Re | (Neb.) (abstract) | 668 |
| Oswego, Colonial Motor Coach Corp. v. . . . (N. Y. Sup. Ct.) (abstract) | 259 | |
| Otto v. Wisconsin Pub. Service Corp. | (Wis.) (abstract) | 251 |
| Pacific Cottonseed Products Corp. v. Atchison, T. & S. F. R. Co. | (Cal.) (abstract) | 201 |
| Pacific Electric R. Co., Re | (Cal.) (abstract) | 136 |
| Pacific Power & Light Co., Department of Public Works ex rel. Asotin v. | (Wash.) | 213 |
| Pacific Teleph. & Teleg. Co., Re | (Cal.) | 80 |
| Pacific Teleph. & Teleg. Co., Re (2 cases) | (Cal.) (abstract) | 380 |
| Parker v. St. Joseph Water Co. | (Mo.) | 161 |
| Pasadena-Ocean Park Stage Line, Re | (Cal.) (abstract) | 374 |
| Peckham, J. B., Co., Re | (Cal.) (abstract) | 133 |
| Pejepscot Paper Co. v. Lisbon (3 cases) (Me. Sup. Jud. Ct.) (abstract) | 207 | |
| Peninsular R. Co., Re (2 cases) | (Cal.) (abstract) | 204 |
| Pennsylvania Co., Sharpsville v. (2 cases) | (Pa.) (abstract) | 568 |
| Pennsylvania R. Co., Re | (Pa.) (abstract) | 371 |
| Peoria Bus Transp. Co., Re. See Chicago & J. Transp. Co., Re | 481 | |
| Peoples Motor Coach Co., Re (2 cases) | (Ind.) (abstract) | 204 |
| Peoples Motor Coach Co., Re (3 cases) | (Ind.) (abstract) | 205 |
| Peoples Motor Coach Co., Re (3 cases) | (Ind.) (abstract) | 374 |
| Peoples Teleph. Co., Re | (Ill.) (abstract) | 667 |
| Peoples Teleph. Co., Re | (Ohio) (abstract) | 668 |
| People's Transit Co. v. Henshaw | (U. S. C. C. A.) (abstract) | 259 |
| Peoples Water, Light & P. Co., Re | (Wis.) (abstract) | 670 |
| Petersburg Water Co., Re | (Ind.) | 47 |
| Philadelphia, B. & W. R. Co., West v. | (Md. Ct. App.) | 139 |
| Pickering Coal Co., Re | (Mo.) | 526 |
| Pishnery v. Brownsville Water Co. | (Pa.) (abstract) | 534 |
| Pittsville Teleph. Co., Railroad Commission ex rel. Smith v. | (Wis.) (abstract) | 372 |
| Polenske Bros.-Schellak & Co. v. Chicago, B. & Q. R. Co. | (Neb.) (abstract) | 203 |
| Polo Teleph. Co. v. DeKalb-Ogle Teleph. Co. | (Ill.) | 696 |
| Pomona, Re | (Cal.) (abstract) | 575 |
| Portland R. Co., Re | (Me.) | 300 |
| Prendergast, Queens Borough Gas & E. Co. v. | (U. S. Dist. Ct.) | 791 |
| Probst, West v. | (Tex. Com. App.) (abstract) | 195 |
| Probst, West v. (3 cases) | (Tex. Com. App.) (abstract) | 370 |
| Public Service Commission, Electric Pub. Utilities Co. v. | (Md. Cir. Ct.) | 854 |
| Public Service Commission, Erb v. | (Pa. Super. Ct.) (abstract) | 252 |
| Public Service Commission v. Missouri Gas & Electric Service Co. | (Mo.) (abstract) | 666 |
| Public Service Commission, Westmoreland Chemical & Color Co. v. (2 cases) | (Pa. Sup. Ct.) (abstract) | 573 |

- | | | |
|---|-----------------------------|-----|
| Public Service Co., Re | (Colo.) | 778 |
| Public Service Co-ordinated Transport, Re | (N. J.) | 264 |
| Public Service Electric & Gas Co., Gould v. | (N. J.) | 321 |
| Public Service Electric & Gas Co., Horn & Hardart Baking Co. v. | | |
| | (N. J.) | 513 |
| Public Utilities Commission, Minerva-Canton Transit Co. v. | | |
| | (Ohio Sup. Ct.) | 130 |
| Public Utility Comrs., Lehigh Valley R. Co. v. (3 cases) | | |
| | (N. J. Sup. Ct.) (abstract) | 567 |
| Puckett, Terre Haute, I. & E. Traction Co. v. | | |
| | (Ind. Ct. App.) (abstract) | 535 |
| Queens Borough Gas & E. Co. v. Prendergast | (U. S. Dist. Ct.) | 791 |
| Rahn, Re | (Colo.) (abstract) | 135 |
| Railroad Commission ex rel. Smith v. Pittsville Teleph. Co. | | |
| | (Wis.) (abstract) | 372 |
| Railroad Commission, Willow River Power Co. v. | (Wis. Sup. Ct.) | 108 |
| Rapid Transit Subway Construction Co. v. New York | | |
| | (N. Y. Sup. Ct.) (abstract) | 210 |
| Reeder, Re | (Ind.) (abstract) | 136 |
| Reeder, Re | (Ind.) (abstract) | 138 |
| Reichert v. Trevorton Water Co. | (Pa.) (abstract) | 382 |
| Rentz, Re | (Cal.) (abstract) | 373 |
| Republic Water Co., Department of Public Works ex rel. Patrons v. | | |
| | (Wash.) (abstract) | 670 |
| Ribnik v. McBride (2 cases) | (U. S. Sup. Ct.) (abstract) | 252 |
| Rock Hill Teleph. Co., Re | (S. C.) | 221 |
| Rock Island S; R. Co., Thompson v. | (Ill.) (abstract) | 534 |
| Rockwood v. Rockwood Water Co. | (Pa.) (abstract) | 669 |
| Rockwood Water Co., Rockwood v. | (Pa.) (abstract) | 669 |
| Rocky Mountain Park Sightseeing Co., Re | (Colo.) (abstract) | 135 |
| Rogers Iron Works Co. v. Joplin Water Works Co. | (Mo.) | 260 |
| Rush County Power Co., Re | (Ind.) | 670 |
| Russell, Re | (Utah) (abstract) | 199 |
| Sac City v. Iowa Light, Heat & P. Co. | (Iowa Sup. Ct.) (abstract) | 239 |
| St. Joseph v. St. Joseph Water Co. | (Mo.) | 161 |
| St. Joseph Water Co., Parker v. | (Mo.) | 161 |
| St. Joseph Water Co., St. Joseph v. | (Mo.) | 161 |
| St. Louis Chicago Motor Transit Co., Re. See Chicago & J. Transp. Co., Re | | 481 |
| St. Louis County Improv. Asso. v. Southwestern Bell Teleph. Co. | | |
| | (Mo.) (abstract) | 206 |
| St. Louis-S. F. R. Co. v. Alabama Pub. Service Commission | | |
| | (U. S. Dist. Ct.) | 613 |
| Salina Teleph. Co., Re | (Utah) (abstract) | 669 |
| San Bernardino, Re | (Cal.) (abstract) | 575 |
| San Diego Electric R. Co., Re | (Cal.) (abstract) | 198 |
| San Gabriel Valley Water Co., Re | (Cal.) (abstract) | 669 |
| San Joaquin & K. R. Canal & Irrig. Co., Re | (Cal.) (abstract) | 533 |
| San Joaquin Grocery Co. v. Southern P. Co. | (Cal.) (abstract) | 202 |

- San Luis Obispo, Re (Cal.) (abstract) 569
 Santa Barbara v. Southern Counties Gas Co. (Cal.) 767
 Schauer's Fast Freight, Re (Wis.) (abstract) 252
 Schuylkill R. Co., Merchants Asso. of Shenandoah v. (Pa.) (abstract) 667
 Selby, Re (Cal.) (abstract) 137
 Sharpsville v. Pennsylvania Co. (2 cases) (Pa.) (abstract) 568
 Shaver v. Shavertown Water Co. (Pa.) (abstract) 669
 Shavertown Water Co., Shaver v. (Pa.) (abstract) 669
 Shepherd v. Garrison (Mo.) (abstract) 139
 Shippey, Maddin & P. Gas Co., Re (Mo.) 691
 Shorewood Water Dept., Re (Wis.) (abstract) 251
 Sierra R. Co., Re (Cal.) (abstract) 139
 Sims Co-op. Teleph. Co., Re (Ind.) (abstract) 668
 Sioux Falls-Brookings Motor Express, Re (S. D.) (abstract) 534
 Smith, Re (Ind.) (abstract) 552
 Smith River Power Co., Re (Cal.) 96
 South Carolina, Columbia R. Gas & E. Co. v. (U. S. C. C. A.) 235
 Southern Bell Teleph. & Teleg. Co., Gonzales v. (2 cases)
 (La.) (abstract) 368
 Southern Counties Gas Co., Re. See Santa Barbara v. Southern Coun-
 ties Gas Co. 767
 Southern Counties Gas Co., Santa Barbara v. (Cal.) 767
 Southern Indiana Gas & E. Co., Re (Ind.) (abstract) 667
 Southern Indiana Teleph. & Teleg. Co., Re (3 cases) (Ind.) (abstract) 668
 Southern Pacific Motor Transport Co., Re (Cal.) (abstract) 135
 Southern P. Co., Re (Cal.) (abstract) 201
 Southern P. Co., Re (Cal.) (abstract) 575
 Southern P. Co., San Joaquin Grocery Co. v. (Cal.) (abstract) 202
 Southern Pub. Utilities Co., Bureau of Lighthouses v. (N. C.) 307
 Southern Wisconsin Electric Co., Himmelman v. (Wis.) (abstract) 198
 Southwest Branch of Rural Reciprocal Teleph. Co. v. Dakota Central
 Teleph. Co. (S. D. Sup. Ct.) 757
 Southwestern Bell Teleph. Co., St. Louis County Improv. Asso. v.
 (Mo.) (abstract) 206
 Spaulding & Frost Co., Re (N. H.) abstract) 251
 Standard Oil Co. v. Hall (U. S. Dist. Ct.) (abstract) 259
 State v. Great Northern R. Co. (N. D. Sup. Ct.) 111
 State Highway Commission v. Wabash R. Co. (Mo.) (abstract) 567
 State Highway Commission v. Wabash R. Co. (Mo.) (abstract) 576
 State Highway Comr., Re (Conn.) (abstract) 576
 State Teleph. Co., Re (Wis.) (abstract) 666
 Stratford, Re (Wis.) (abstract) 208
 Subin v. New York (N. Y. Mun. Ct.) (abstract) 207
 Sunset R. Co., Union Paving Co. v. (Cal.) (abstract) 201
 Sutherland, Re (Cal.) (abstract) 136
 Sweet Springs Teleph. Co., Re (Mo.) (abstract) 380
 S. Y. A. Bus Line, Re (Neb.) 98
 Terre Haute, Gregg v. (Ind.) (abstract) 553
 Terre Haute, I. & E. Traction Co. v. Puckett (Ind. Ct. App.) (abstract) 553

- Teutopolis Teleph. Co., Illinois Commerce Commission v. (Ill.) (abstract) 667
 Texas & N. O. R. Co., Louisiana Pub. Service Commission v. (2 cases) (La.) (abstract) 378
 Texas Carriers, Dallas Chamber of Commerce v. ... (Tex.) (abstract) 202
 Texas Railroad Commission, Hi-Ball Transit Co. v. ... (U. S. Dist. Ct.) 103
 Third Avenue R. Co., Klinkenstein v. (N. Y. Ct. App.) (abstract) 133
 Third Avenue R. Co., Klinkenstein v. (N. Y. Ct. App.) (abstract) 249
 Thompson v. Rock Island S. R. Co. (Ill.) (abstract) 534
 Trevorton Water Co., Reichert v. (Pa.) (abstract) 382
 Tri-State Bus Co., Re. See Chicago & J. Transp. Co., Re 481
 Tri-State Teleph. & Teleg. Co., Re (Minn.) 775
 Truckee River Power Co., Re (Cal.) 83
 Unbehaun v. Commonwealth Teleph. Co. (Wis.) abstract 207
 Union Electric Co., Re (Mont.) 396
 Union Electric Light & P. Co., Boyd v. (Mo.) 266
 Union Electric Light & P. Co., DeSalme v. (Mo.) 310
 Union Electric Light & P. Co., Macke v. (2 cases) ... (Mo.) (abstract) 372
 Union Paving Co. v. Sunset R. Co. (Cal.) (abstract) 201
 United Commercial Travelers of America v. Chicago, M. & St. P. R. Co. (S. D.) (abstract) 379
 United Electric R. Co., Re (R. I.) (abstract) 205
 United Parcel Service, Coronado Transfer v. (2 cases) (Cal.) (abstract) 250
 United R. Co., Re (Mo.) 419
 United Stages, Re (Cal.) (abstract) 137
 U. S. Airways, Re (Colo.) 518
 United States, Anchor Coal Co. v. (2 cases) (U. S. Dist. Ct.) (abstract) 195
 United States, Anchor Coal Co. v. (U. S. Dist. St.) (abstract) 197
 Urbana, Re. See Illinois Bell Teleph. Co., Re 279
 Utah Light & Traction Co., Re (Utah) (abstract) 371
 Utah Light & Traction Co., Re (Utah) (abstract) 373
 Utah Power & Light Co., Logan City v. (Utah) 57
 Utica Gas & E. Co., Clark v. (N. Y. App. Div.) 657
 Utica Mining Co., Williams v. (Cal.) (abstract) 369
 Utica Mining Co., Williams v. (3 cases) (Cal.) (abstract) 378
 Valley & Coast Transit Co., Re (Cal.) (abstract) 317
 Van Camp Sea Food Co. v. Los Angeles & S. L. R. Co. (Cal.) (abstract) 198
 Vicory, Re (Mo.) (abstract) 666
 Vincennes Water Supply Co., Re (Ind.) (abstract) 666
 Wabash R. Co., State Highway Commission v. (Mo.) (abstract) 567
 Wabash R. Co., State Highway Commission v. (Mo.) (abstract) 576
 Warner, Re (Cal.) (abstract) 663
 Washington-Interurban R. Co., Re (D. C.) 712
 Washington Motor Coach Co. v. West (Md. Cir. Ct.) (abstract) 259
 Washington-Union-St. Louis Bus Co., Re (Mo.) (abstract) 133
 Waterloo Line, Re (Ind.) (abstract) 249

- Waterloo Line, Re (Ind.) (abstract) 533
 Wauzeka Creamery Co. v. Wauzeka Light & P. Co. (Wis.) 158
 Wauzeka Light & P. Co., Wauzeka Creamery Co. v. (Wis.) 158
 Westby, Re (Wis.) (abstract) 667
 West Coast Power Co., Re (Or.) (abstract) 533
 Western Crawford County Farmers Mut. Teleph. Co., Re (Wis.) (abstract) 664
 Western P. R. Co. v. Northwestern P. R. Co. (2 cases) (Cal.) (abstract) 201
 Westminster Water Works, Department of Public Works ex rel. Patrons v. (Wash.) (abstract) 670
 Westmoreland Chemical & Color Co. v. Public Service Commission (2 cases) (Pa. Sup. Ct.) (abstract) 573
 West v. Philadelphia, B. & W. R. Co. (Md. Ct. App.) 139
 West v. Probst (Tex. Com. App.) (abstract) 195
 West v. Probst (3 cases) (Tex. Com. App.) (abstract) 370
 West, Washington Motor Coach Co. v. (Md. Cir. Ct.) (abstract) 259
 Weyauwega Teleph. Co., Re (Wis.) (abstract) 666
 Wharton & N. R. Co., Kaufman & Sons Co. v. (N. J.) (abstract) 203
 Wichita v. Kansas Gas & E. Co. (Kan.) 634
 Willhour, Bakersfield & Los Angeles Fast Freight Co. v. (Cal.) (abstract) 251
 Williams v. Utica Mining Co. (Cal.) (abstract) 369
 Williams v. Utica Mining Co. (3 cases) (Cal.) (abstract) 378
 Willow River Power Co. v. Railroad Commission (Wis. Sup. Ct.) 108
 Wisconsin-Michigan Power Co., Re (Wis.) (abstract) 368
 Wisconsin-Michigan Power Co., Re (Wis.) (abstract) 552
 Wisconsin Power & Light Co., Re (Wis.) (abstract) 200
 Wisconsin Power & Light Co., Beaver Dam v. (Wis.) (abstract) 664
 Wisconsin Power & Light Co., Beaver Dam v. (Wis.) (abstract) 666
 Wisconsin Pub. Service Corp., Otto v. (Wis.) (abstract) 251
 Wisconsin Teleph. Co., Re (Wis.) (abstract) 207
 Wisconsin Teleph. Co., Re (Wis.) (abstract) 373
 Wisconsin Teleph. Co., Re (2 cases) (Wis.) (abstract) 381
 Wisconsin Teleph. Co., Re (Wis.) (abstract) 382
 Wisconsin Teleph. Co., Re (Wis.) (abstract) 665
 Wisconsin Teleph. Co., Re (3 cases) (Wis.) (abstract) 666
 Wood, Re (Colo.) (abstract) 136
 Wood, Re (Pa.) (abstract) 574
 Yale v. Great Northern R. Co. (S. D.) (abstract) 379
 York Harbor & Beach R. Co., Re (Me.) (abstract) 251

TABLE OF CASES BY JURISDICTIONS.

See also list of Appeals, Rehearings, and Modifications, post, p. xlvi.

COURT CASES.

United States Circuit Court of Appeals.

Bell v. Harlan (abstract)	251
Bell v. Harlan (abstract)	259
Columbia R. Gas & E. Co. v. South Carolina	235
Cudahy Packing Co. v. Omaha (abstract)	195
Cudahy Packing Co. v. Omaha (abstract)	210
People's Transit Co. v. Henshaw (abstract)	259

United States District Court.

Anchor Coal Co. v. United States (2 cases) (abstract)	195
Anchor Coal Co. v. United States (abstract)	197
Cambridge Electric Light Co. v. Atwill	253
Film Transport Co. v. Michigan Pub. Utilities Commission (abstract)	252
Hi-Ball Transit Co. v. Texas Railroad Commission	103
Los Angeles R. Corp. v. California R. Commission	584
Queens Borough Gas & E. Co. v. Prendergast	791
St. Louis-S. F. R. Co. v. Alabama Pub. Service Commission	613
Standard Oil Co. v. Hall (abstract)	259

United States Supreme Court.

Ribnik v. McBride (2 cases) (abstract)	252
--	-----

Alabama Supreme Court.

Birmingham Electric Co. v. Allen (abstract)	367
---	-----

Indiana Court of Appeals.

Terre Haute, I. & E. Traction Co. v. Puckett (abstract)	535
---	-----

Iowa Supreme Court.

Sac City v. Iowa Light, Heat & P. Co. (abstract)	259
--	-----

Maine Supreme Court.

Pejepscot Paper Co. v. Lisbon (3 cases) (abstract)	207
--	-----

Maryland Circuit Court.

Electric Pub. Utilities Co. v. Public Service Commission	854
Washington Motor Coach Co. v. West (abstract)	259

Maryland Court of Appeals.

West v. Philadelphia, B. & W. R. Co.	139
---	-----

Michigan Supreme Court.

Antisdel v. Macatawa Resort Co.	606
--------------------------------------	-----

Nebraska Supreme Court.

Farmers' & Merchants' Teleph. Co. v. Orleans Community Club	787
---	-----

New Hampshire Supreme Court.

Collette v. Boston & M. R. Co. (abstract)	577
---	-----

New Jersey Supreme Court.

Lehigh Valley R. Co. v. Public Utility Comrs. (3 cases) (abstract) ...	567
--	-----

New York Appellate Division.

Clark v. Utica Gas & E. Co.	657
----------------------------------	-----

New York Court of Appeals.

Klinkenstein v. Third Avenue R. Co. (abstract)	133
Klinkenstein v. Third Avenue R. Co. (abstract)	249

New York Municipal Court.

Subin v. New York (abstract)	207
------------------------------------	-----

New York Supreme Court.

Colonial Motor Coach Corp. v. Oswego (abstract)	259
Mamaroneek v. New York Interurban Water Co. (abstract)	259
Rapid Transit Subway Construction Co. v. New York (abstract)	210

North Dakota Supreme Court.

North Dakota Mill & Elevator Asso. v. Great Northern R. Co.	111
State v. Great Northern R. Co.	111

Ohio Supreme Court.

Minerva-Canton Transit Co. v. Public Utilities Commission	130
---	-----

CASES REPORTED (BY JURISDICTIONS).

xxxvii

Pennsylvania Superior Court.

Erb v. Public Service Commission (abstract)	252
---	-----

Pennsylvania Supreme Court.

Westmoreland Chemical & Color Co. v. Public Service Commission (2 cases) (abstract)	573
---	-----

South Dakota Supreme Court.

Southwest Branch of Rural Reciprocal Teleph. Co. v. Dakota Central Teleph. Co.	757
---	-----

Texas Commission of Appeals.

West v. Probst (abstract)	195
West v. Probst (3 cases) (abstract)	370

Washington Supreme Court.

Columbia River Teleph. Co. v. Department of Public Works	520
--	-----

Wisconsin Supreme Court.

Willow River Power Co. v. Railroad Commission	108
---	-----

COMMISSION CASES.**Alabama.**

Alabama Power Co., Re	383
Alabama, T. & N. R. Corp. v. Alabama Great Southern R. Co. (3 cases) (abstract)	532
Central of Georgia Motor Transport Co., Re	535

Arizona.

Arizona Box Co. v. Apache R. Co. (abstract)	378
Arizona Packing Co. v. Arizona Eastern R. Co. (abstract)	202
Motor Vehicle Common Carriers, Re (abstract)	552

California.

Albers Bros. Milling Co., Re (abstract)	253
Ashbury Truck Co., Re (abstract)	133
Bacon Service Corp., Re (abstract)	137
Bakersfield & Los Angeles Fast Freight Co. v. Gombos (abstract)	137
Bakersfield & Los Angeles Fast Freight Co. v. Willhour (abstract)	251
Balish, Re (abstract)	136
Bay and River Boat Owners' Asso. v. Anderson	86

xxxviii CASES REPORTED (BY JURISDICTIONS).

Berkeley, Re (abstract)	574
Board of Supervisors of Kern County, Re (abstract)	574
Burbank, Re (abstract)	574
California Cattlemen's Asso. v. Minarets & W. R. Co. (2 cases) (abstract)	198
California Transit Co. v. Auto Tours Continental Club (abstract)	551
Carpenter, Re (abstract)	137
Chichizola Estate Co., Re (abstract)	370
Cochran, Re (abstract)	138
Condos, Re (abstract)	575
Coronado Transfer v. United Parcel Service (2 cases) (abstract)	250
Coulter v. Anderson (abstract)	138
Delta Teleph. & Teleg. Co., Re (abstract)	665
Diamond Ridge Water Co., Re (abstract)	200
Duggan, Re (abstract)	138
Flintridge Motor Co., Re (abstract)	134
Frost & Co., Re (2 cases) (abstract)	250
Hare v. Gilboy (abstract)	250
Hazard, Re (abstract)	138
Home Teleph. Co., Re (abstract)	206
Lande v. Napa Ranch (abstract)	250
Los Altos Water Co., Re (abstract)	669
Los Angeles, Re (abstract)	575
Marysville, Re (abstract)	569
McConnel, Re (abstract)	551
McGann, Re (abstract)	138
McGeoghegan, Re (abstract)	134
Monroe, Re (abstract)	196
Motor Service Express, Re (abstract)	196
Motor Service Express, Re (abstract)	198
Narbonne Ranche Water Co. No. 2, Re (2 cases) (abstract)	382
Ontario Feed & Milling Co., Re (abstract)	252
Pacific Cottonseed Products Corp. v. Atchison, T. & S. F. R. Co. (abstract)	201
Pacific Electric R. Co., Re (abstract)	136
Pacific Teleph. & Teleg. Co., Re	80
Pacific Teleph. & Teleg. Co., Re (2 cases) (abstract)	380
Pasadena-Ocean Park Stage Line, Re (abstract)	374
Peckham, J. B., Co., Re (abstract)	133
Peninsular R. Co., Re (2 cases) (abstract)	204
Pomona, Re (abstract)	575
Rentz, Re (abstract)	373
San Bernardino, Re (abstract)	575
San Diego Electrie R. Co., Re (abstract)	198
San Gabriel Valley Water Co., Re (abstract)	669
San Joaquin & K. R. Canal & Irrig. Co., Re (abstract)	533
San Joaquin Grocery Co. v. Southern P. Co. (abstract)	202
San Luis Obispo, Re (abstract)	569

Santa Barbara v. Southern Counties Gas Co.	767
Selby, Re (abstract)	137
Sierra R. Co., Re (abstract)	139
Smith River Power Co., Re	96
Southern Pacific Motor Transport Co., Re (abstract)	135
Southern P. Co., Re (abstract)	201
Southern P. Co., Re (abstract)	575
Sutherland, Re (abstract)	136
Truckee River Power Co., Re	83
Union Paving Co. v. Sunset R. Co. (abstract)	201
United Stages, Re (abstract)	137
Valley & Coast Transit Co., Re (abstract)	317
Van Camp Sea Food Co. v. Los Angeles & S. L. R. Co. (abstract)	198
Warner, Re (abstract)	663
Western P. R. Co. v. Northwestern P. R. Co. (2 cases) (abstract)	201
Williams v. Utica Mining Co. (abstract)	369
Williams v. Utica Mining Co. (3 cases) (abstract)	378

Canada.

Bell Teleph. Co., Re (abstract)	665
Bell Teleph. Co., Re (abstract)	667
Davidson v. Mount Albert Teleph. Co. (abstract)	533

Colorado.

Arvada Electric Co., Re	471
Buster, Re (abstract)	199
Buster, Re (3 cases) (abstract)	375
Colorado & S. R. Co., Re (abstract)	373
Colorado Cab Co., Re (abstract)	368
Colorado Cab Co., Re (5 cases) (abstract)	375
Colorado Cab Co., Re (abstract)	532
County Comrs. of Kit Carson County, Re (abstract)	576
County Comrs. of Weld County v. Capron (abstract)	251
Craig, Re	60
Cripple Creek v. Cripple Creek Water Co.	388
Diehl, Re (abstract)	134
Exhibitors Film Delivery & Service Co., Re	623
G. & W. Garage and Tours Co., Re	64
Glacier Route, Re (abstract)	552
Hitehecock & Tinkler Equipment Co. v. Denver & Salt Lake R. Co.	681
Public Service Co., Re	778
Rahn, Re (abstract)	135
Rocky Mountain Park Sightseeing Co., Re (abstract)	135
U. S. Airways, Re	518
Wood, Re (abstract)	136

Connecticut.

Berton, Re (abstract)	368
Groton & Stonington Traction Co., Re (abstract)	380
Hartford v. New York, N. H. & H. R. Co.	556
New York, N. H. & H. R. Co., Re (2 cases) (abstract)	569
State Highway Comr., Re (abstract)	576

District of Columbia.

Washington-Interurban R. Co., Re	712
--	-----

Idaho.

Darnielle, Re	211
---------------------	-----

Illinois.

Board of Trade Warehouse Corp., Re	65
Bunker Hill Teleph. Co., Re (abstract)	667
Central Illinois Pub. Service Co., Re (abstract)	665
Central Northwest Business Men's Asso. v. Chicago Surface Lines (abstract)	134
Central Northwest Business Men's Asso. v. Chicago Surface Lines	685
Chicago & J. Transp. Co., Re	481
C. T. & N. Teleph. Co., Re (abstract)	206
Department of Public Works and Buildings, Division of Highways v. Chicago, R. I. & P. R. Co. (abstract)	570
Department of Public Works and Buildings, Division of Highways v. Chicago, R. I. & P. R. Co. (abstract)	572
Henderson County Pub. Service Co., Re (abstract)	196
Henderson County Pub. Service Co., Re (abstract)	199
Illinois Bell Teleph. Co., Re	279
Illinois Coal Traffic Bureau v. Atchison, T. & S. F. R. Co. (abstract)	198
Illinois Coal Traffic Bureau v. Atchison, T. & S. F. R. Co. (2 cases) (abstract)	201
Illinois Commerce Commission v. East St. Louis Light & P. Co. (abstract)	200
Illinois Commerce Commission v. Illinois Bell Teleph. Co. (abstract)	533
Illinois Commerce Commission v. Teutopolis Teleph. Co. (abstract)	667
Illinois Power & Light Corp., Re (3 cases) (abstract)	204
Illinois Power Co., Re (abstract)	204
Middle States Teleph. Co., Re (abstract)	664
Peoples Teleph. Co., Re (abstract)	667
Polo Teleph. Co. v. DeKalb-Ogle Teleph. Co.	696
Thompson v. Rock Island S. R. Co. (abstract)	534

Indiana.

Argos Teleph. Co., Re	271
Chicago, I. & L. R. Co., Re (abstract)	367

Chicago, I. & L. R. Co., Re (abstract)	369
Chicago, S. S. & S. B. R. Co., Re (abstract)	136
County Comrs. of Clark County v. Baltimore & O. R. Co. (abstract)	567
Danville-Terre Haute Ltd. Bus Co., Re (abstract)	138
Decatur County Independent Teleph. Co., Re	1
Decatur County Independent Teleph. Co., Re (abstract)	198
Decatur County Independent Teleph. Co., Re (abstract)	667
Detchon, Re (abstract)	667
Elwood Water Co., Re	699
Extensions of Electric Servicee, Re	517
Gregg v. Terre Haute (abstract)	553
Hammond v. Hammond, W. & E. C. R. Co.	577
Indiana Service Corp., Re (abstract)	380
Indiana Teleph. & Teleg. Co., Re (abstract)	664
Indianapolis Power & Light Co., Re (abstract)	367
Laporte County Indiana Teleph. Co., Re (abstract)	668
Logansport Home Teleph. Co., Re	714
Martinsville Teleph. Co., Re	553
McMahon v. Nickel Plate Road (abstract)	535
Peoples Motor Coach Co., Re (2 cases) (abstract)	204
Peoples Motor Coach Co., Re (3 cases) (abstract)	205
Peoples Motor Coach Co., Re (3 cases) (abstract)	374
Petersburg Water Co., Re	47
Reeder, Re (abstract)	136
Reeder, Re (abstract)	138
Rush County Power Co., Re	670
Sims Co-op. Teleph. Co., Re (abstract)	668
Smith, Re (abstract)	552
Southern Indiana Gas & E. Co., Re (abstract)	667
Southern Indiana Teleph. & Teleg. Co., Re (3 cases) (abstract)	668
Vincennes Water Supply Co., Re (abstract)	666
Waterloo Line, Re (abstract)	249
Waterloo Line, Re (abstract)	533

Iowa.

Farmers Co-op. Grain & Lumber Co. v. Minneapolis & St. L. R. Co. (abstract)	534
Illinois C. R. Co. v. Meyer (2 cases) (abstract)	572

Kansas.

Wichita v. Kansas Gas & E. Co.	634
-------------------------------------	-----

Louisiana.

Gonzales v. Southern Bell Teleph. & Teleg. Co. (2 cases) (abstract)	368
Louisiana Pub. Service Commission v. Texas & N. O. R. Co. (2 cases) (abstract)	378

Maine.

Andover Water Co., Re (abstract)	664
Andover Water Co., Re (abstract)	669
Androscoggin & K. R. Co., Re	347
Dixfield Light & Water Co. v. Itself (abstract)	664
Dixfield Light & Water Co. v. Itself (abstract)	665
Kingfield Water Co. v. Itself (abstract)	669
Norway Water Co., Re (abstract)	253
Portland R. Co., Re	300
York Harbor & Beach R. Co., Re (abstract)	251

Maryland.

Baldwin v. Chesapeake & P. Teleph. Co.	529
---	-----

Massachusetts.

Burtman Iron & Wire Works, Re (abstract)	200
MacDonald, Re	789
New York, N. H. & H. R. Co., Re	863

Michigan.

Gilmore Bros. v. Benton Harbor-St. Joe R. & Light Co. (abstract)	200
---	-----

Minnesota.

Chicago, St. P. M. & O. R. Co., Re (abstract)	576
Gilmer v. Great Northern R. Co. (abstract)	378
Tri-State Teleph. & Teleg. Co., Re	775

Missouri.

Akers and Diehl, Re (abstract)	253
Baird, Re (abstract)	133
Boyd v. Union Electric Light & P. Co.	266
Bunceton Chamber of Commerce v. Missouri P. R. Co. (abstract)	369
Cayce, Re	316
Dearborn v. Midwest Teleph. Co.	175
De Salme v. Union Electric Light & P. Co.	310
Jackson County v. Missouri P. R. Co. (2 cases) (abstract)	572
Lee's Summit v. Independence Water Works Co.	184
Lexington Water Co., Re	322
Macke v. Union Electric Light & P. Co. (2 cases) (abstract)	372
Makin v. Missouri Pub. Service Commission	290
Mayor of Grandview v. Missouri Pub. Service Commission	290
Missouri P. R. Co., Re (abstract)	373
Missouri P. R. Co., Re (abstract)	374
Parker v. St. Joseph Water Co.	161

CASES REPORTED (BY JURISDICTIONS).

xliii

Pickering Coal Co., Re	526
Public Service Commission v. Missouri Gas & Electric Service Co. (abstract)	666
Rogers Iron Works Co. v. Joplin Water Works Co.	260
St. Joseph v. St. Joseph Water Co.	161
St. Louis County Improv. Asso. v. Southwestern Bell Teleph. Co. (abstract)	206
Shepherd v. Garrison (abstract)	139
Shippey, Maddin & P. Gas Co., Re	691
State Highway Commission v. Wabash R. Co. (abstract)	567
State Highway Commission v. Wabash R. Co. (abstract)	576
Sweet Springs Teleph. Co., Re (abstract)	380
United R. Co., Re	419
Vicory, Re (abstract)	666
Washington-Union-St. Louis Bus Co., Re (abstract)	133

Montana.

Butte-Virginia City Freight Service, Re (2 cases) (abstract)	375
Butte-Virginia City Freight Service, Re (abstract)	552
Courville, Re (abstract)	553
Didriksen, Re (abstract)	376
Great Falls Gas Co., Re	803
Union Electric Co., Re	396

Nebraska.

Chicago, R. I. & P. R. Co., Re (abstract)	203
Continental Teleph. Co., Re (abstract)	206
Farmers Mut. Teleph. Co., Re (abstract)	206
Farmers Teleph. Co., Re (abstract)	534
Lincoln Teleph. & Teleg. Co., Re (abstract)	367
Lincoln Teleph. & Teleg. Co., Re (abstract)	381
Northwestern Bell Teleph. Co., Re (abstract)	207
Northwestern Bell Teleph. Co., Re (abstract)	369
Northwestern Bell Teleph. Co., Re (abstract)	373
Northwestern Bell Teleph. Co., Re (abstract)	381
Northwestern Bell Teleph. Co., Re (abstract)	668
Nuckolls County Independent Teleph. Co., Re (abstract)	207
Omaha & Lincoln R. & Light Co., Re (abstract)	258
Omaha, Lincoln & Beatrice R. Co., Re (abstract)	370
Osmond Teleph. Co., Re (abstract)	668
Polenske Bros.-Schellak & Co. v. Chicago, B. & Q. R. Co. (abstract)	203
S. Y. A. Bus Line, Re	98

New Hampshire.

Boston & M. R. Co., Re (abstract)	577
Caplan, Re (abstract)	249
Caplan, Re (abstract)	552

Keene Electric R. Co., Re (abstract)	577
Nashua Street R. Co., Re (abstract)	205
Spaulding & Frost Co., Re (abstract)	251

New Jersey.

Gloucester Township, Re (abstract)	567
Gould v. Public Service Electric & Gas Co.	321
Horn & Hardart Baking Co. v. Public Service Electric & Gas Co.	513
Kaufman & Sons Co. v. Wharton & N. R. Co. (abstract)	203
Long Beach Water Co., Re (abstract)	382
Mayor and Aldermen of Jersey City, Re (abstract)	379
Middlesex, Re (abstract)	205
Public Service Coordinated Transport, Re	264

New Mexico.

Atchison, T. & S. F. R. Co., Re (abstract)	571
--	-----

New York.

Board of Estimate and Apportionment, Re (abstract)	570
Cale and Smith v. Jamestown Teleph. Corp.	276
Camden v. Lehigh Valley R. Co. (abstract)	371
Cato v. Lehigh Valley R. Co. (abstract)	371
Consolidated Gas Co., Re	19
Consolidated Gas Co., Re	478
Empire Oil Co. v. Jamestown Teleph. Corp.	276
Genesee & Wyoming R. Co., Re (2 cases) (abstract)	367
Genesee & Wyoming R. Co., Re (3 cases) (abstract)	370
Genesee & Wyoming R. Co., Re (abstract)	533
Long Island R. Co., Re (abstract)	573
New York, Re (2 cases) (abstract)	568
New York, Re (abstract)	576
New York Power & Light Corp., Re	781

North Carolina.

Bureau of Lighthouses v. Southern Pub. Utilities Co.	307
---	-----

North Dakota.

Clermont Township v. Chicago, M. & St. P. R. Co. (abstract)	535
Clermont Township v. Chicago, M. & St. P. R. Co. (2 cases) (abstract)	573

Ohio.

Baltimore & O. R. Co., Re (abstract)	567
Baltimore & O. R. Co., Re (5 cases) (abstract)	571
Baltimore & O. R. Co., Re (abstract)	577

CASES REPORTED (BY JURISDICTIONS).

xlv

Cincinnati & Suburban Bell Teleph. Co., Re (abstract)	668
Fireproof Warehouse & Storage Co., Re (abstract)	199
Northern Ohio Power & Light Co. v. Motor Freight	609
Peoples Teleph. Co., Re (abstract)	668

Oklahoma.

American Indian Oil & Gas Co., Re (abstract)	377
County Comrs. of Oklahoma County v. MKT R. Co. (abstract)	571
Leland, Re (abstract)	197
Oklahoma-Arkansas Teleph. Co., Re	737

Oregon.

West Coast Power Co., Re (abstract)	533
---	-----

Pennsylvania.

Brubaker v. Millersburg Home Water Co. (abstract)	669
Citizens Committee of Summit Hill v. East Penn Electric Co.	288
Conyngham v. Conyngham Water Co. (abstract)	208
Freas v. Erie & Wyoming Valley R. Co. (2 cases) (abstract)	368
Freas v. Erie & Wyoming Valley R. Co. (abstract)	379
Freas v. Erie & Wyoming Valley R. Co. (abstract)	533
Hall v. Clarks Summit Water Co. (abstract)	669
Kittanning v. Armstrong Water Co. (abstract)	669
Merchants Asso. of Shenandoah v. Schuylkill R. Co. (abstract)	667
Mushroom Transp. Co. v. Carroll & Fox (abstract)	376
New Castle Electric Street R. Co., Re (abstract)	371
Northwestern Electric Service Co., Re	764
Pennsylvania R. Co., Re (abstract)	371
Pishnery v. Brownsville Water Co. (abstract)	534
Reichert v. Trevorton Water Co. (abstract)	382
Rockwood v. Rockwood Water Co. (abstract)	669
Sharpsville v. Pennsylvania Co. (2 cases) (abstract)	568
Shaver v. Shavertown Water Co. (abstract)	669
Wood, Re (abstract)	574

Rhode Island.

United Electric R. Co., Re (abstract)	205
---	-----

South Carolina.

Rock Hill Teleph. Co., Re	221
---------------------------------	-----

South Dakota.

Hewitt, Re (abstract)	376
Sioux Falls-Brookings Motor Express, Re (abstract)	534

United Commercial Travelers of America v. Chicago, M. & St. P. R. Co. (abstract)	379
Yale v. Great Northern R. Co. (abstract)	379

Texas.

Dallas Chamber of Commerce v. Texas Carriers (abstract)	202
---	-----

Utah.

Logan City v. Utah Power & Light Co.	57
Moroni Teleph. Co., Re (abstract)	668
Russell, Re (abstract)	199
Salina Teleph. Co., Re (abstract)	669
Utah Light & Traction Co., Re (abstract)	371
Utah Light & Traction Co., Re (abstract)	373

Washington.

Arthaud v. Oregon-Washington R. & Nav. Co. (abstract)	202
Davis & Bunker, Re (abstract)	376
Department of Public Works v. Chehalis & Boistfort Teleph. Co. (abstract)	669
Department of Public Works v. Chinook Water Works (abstract)	382
Department of Public Works v. Chinook Water Works (abstract)	666
Department of Public Works ex rel. Asotin v. Pacific Power & Light Co.	213
Department of Public Works ex rel. Deer Park v. Mount Spokane Power Co. (2 cases) (abstract)	377
Department of Public Works ex rel. Deer Park v. Mount Spokane Power Co. (abstract)	667
Department of Public Works ex rel. Friday Harbor v. Friday Harbor Light & P. Co.	660
Department of Public Works ex rel. Morton v. Morton Electric Co. (abstract)	377
Department of Public Works ex rel. Patrons v. Comfort (abstract) ...	669
Department of Public Works ex rel. Patrons v. Easton Water System (abstract)	670
Department of Public Works ex rel. Patrons v. Republic Water Co. (abstract)	670
Department of Public Works ex rel. Patrons v. Westminster Water Works (abstract)	670
North Bend v. North Bend Heat, Light, Water & Power Co. (abstract)	666

West Virginia.

Clarksburg Light & Heat Co., Re	728
---------------------------------------	-----

Wisconsin.

Auto Transp. Co., Re (abstract)	199
Beaver Dam v. Wisconsin Power & Light Co. (abstract)	664
Beaver Dam v. Wisconsin Power & Light Co. (abstract)	666
Cambridge, Re	707
Chicago, M. St. P. & P. R. Co., Re (3 cases) (abstract)	374
Commonwealth Teleph. Co., Re (abstract)	251
Commonwealth Teleph. Co., Re (abstract)	368
Fountain City Teleph. Co., Re (abstract)	381
Freeman Teleph. Co., Re (abstract)	197
Himmelman v. Southern Wisconsin Electric Co. (abstract)	198
Iron River v. Northland Transp. Co. (3 cases) (abstract)	376
Johnson v. Eagle River Water & Light Commission (abstract)	369
Johnson v. Eagle River Water & Light Commission (abstract)	377
Lebanon Teleph. Co., Re (abstract)	381
Legislative Joint Resolution No. 59, Re (abstract)	568
Madison Gas & E. Co., Re	601
Middleton-Madison Motor Coach Co., Re (abstract)	199
Milwaukee Electric R. & Light Co., Re	15
Milwaukee v. Milwaukee Electric R. & Light Co. (abstract)	380
Milwaukee v. Milwaukee Electric R. & Light Co.	679
Minoqua v. Eagle River	208
Otto v. Wisconsin Pub. Service Corp. (abstract)	251
Peoples Water, Light & P. Co., Re (abstract)	670
Railroad Commission ex rel. Smith v. Pittsville Teleph. Co. (abstract)	372
Schauer's Fast Freight, Re (abstract)	252
Shorewood Water Dept., Re (abstract)	251
State Teleph. Co., Re (abstract)	666
Stratford, Re (abstract)	208
Unbehaun v. Commonwealth Teleph. Co. (abstract)	207
Wauzeka Creamery Co. v. Wauzeka Light & P. Co.	158
Westby, Re (abstract)	667
Western Crawford County Farmers Mut. Teleph. Co., Re (abstract)	664
Weyauwega Teleph. Co., Re (abstract)	666
Wisconsin-Michigan Power Co., Re (abstract)	368
Wisconsin-Michigan Power Co., Re (abstract)	552
Wisconsin Power & Light Co., Re (abstract)	200
Wisconsin Teleph. Co., Re (abstract)	207
Wisconsin Teleph. Co., Re (abstract)	373
Wisconsin Teleph. Co., Re (2 cases) (abstract)	381
Wisconsin Teleph. Co., Re (abstract)	382
Wisconsin Teleph. Co., Re (abstract)	665
Wisconsin Teleph. Co., Re (3 cases) (abstract)	666

LIST OF APPEALS, REHEARINGS, AND MODIFICATIONS.

Massachusetts.

Cambridge Electric Light Co. v. Attwill, P.U.R.1928C, p. 24.

Bill for injunction dismissed by agreement, with understanding that finding of value by Department and finding of rate of return shall not be binding upon utility or used as evidence in any future rate proceeding (February 11, 1929).

Missouri.

United R. Co., Re, P.U.R.1928E, p. 419.

Motion for rehearing denied (July 25, 1928).

New York.

Horton v. Prendergast, P.U.R.1928D, p. 198.

Appeal dismissed by United States Supreme Court for want of a substantial Federal question on the authority of Offield v. New York, N. H. & H. R. Co. 203 U. S. 372, 375, 51 L. ed. 231, 27 Sup. Ct. Rep. 72; Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co. 240 U. S. 30, 32, 60 L. ed. 507, 36 Sup. Ct. Rep. 234 (January 7, 1929).

Wisconsin.

Menasha Municipal Water Dept., Re, P.U.R.1929A, p. 1.

Order amended by appending additional rates containing minimum water bill for 8 inch and 12 inch meters (July 21, 1928).

PUBLIC UTILITIES REPORTS

INDIANA PUBLIC SERVICE COMMISSION.

RE DECATUR COUNTY INDEPENDENT TELEPHONE
COMPANY.

[No. 9309.]

Valuation — Comparisons as evidence — Tax assessments — Stock value.

1. Where the actual value of utility property indicated by comparisons with tax assessments is in substantial agreement with such value indicated by the value of stock and outstanding securities, the composite figure thus attained may be regarded by the Commission as evidence of fair value though not controlling for rate-making purposes, p. 7.

Valuation — Fair value defined.

2. Fair value was, according to law, defined to mean a value, the rate of return from which, will be fair and reasonable to owners as well as patrons of such utility as a base upon which to pay rates for service, giving equal consideration to what the service is worth to the patrons and what the property is worth to the owners, p. 7.

Valuation — Going value — Percentage as a comparison.

3. A percentage basis, although regarded as unsound in determining going concern value, was used in particular circumstances to illustrate the manifest excess of a proposed allowance, p. 8.

Valuation — Construction overheads — Interest — Supervision — Taxes.

4. Overhead construction costs were not permitted to be reproduced in a valuation appraisal where the construction was actually done from time to time, and two-thirds of the amount had probably never been expended, or were already taken care of in annual operating expenses such as taxes, supervision, and interest during construction, p. 8.

Valuation — Factors for consideration — Discrepancy of appraisal.

5. It was held that the determination of fair value of utility property should be based in part upon the prices paid for common stock, in part upon tax appraisals, in part upon invested capital account, and in part upon engineering appraisals especially where estimates of reproduction cost by engineers differed so widely and often as to impair Commission confidence in their reliability, p. 9.

Depreciation — Percentage allowed — Telephones.

6. A proposed allowance of 5 per cent per annum for depreciation over depreciable property of a telephone utility was held to be excessive, and a composite rate of 4 per cent per annum was established, p. 10.

Rates — Telephones — Redgrading of service — Necessity for comparison.

7. Redgrading of service is not justified in the absence of testimony by competent witnesses as to the experience of similar telephone utilities under circumstances that are similar to the circumstances and conditions in the cause at bar, p. 10.

Return — Operating expenses — Excessive official salaries.

8. Salaries for certain officials of a telephone company were thought by the Commission to be excessive and were not allowed in their full amount as proper operating expenses, p. 11.

Return — Operating expenses — Expense of former rate case.

9. Where the rates authorized in a particular proceeding are for future periods the rate case expenses of a prior cause are nonrecurring items, and are not proper items to be amortized as part of expense in the particular case and will not be allowed, p. 12.

Return — Operating expenses — Excessive maintenance cost of deficient equipment.

10. Maintenance expense for a peculiar type of telephone switchboard costing five times as much as such expense for other types with bigger and better service capacity, was not allowed as an annual operating expense in excess of a reasonable figure therefor, the balance to be charged to revenues available for return, p. 12.

Return — Percentage allowed — Telephones.

11. An increase of telephone rates was authorized calculated to yield a return of approximately seven per cent on the total fair value of the utility, p. 13.

Valuation — Effect of reproduction cost — Appraisal.

Statement that if appraisal of cost to reproduce has great influence in determining fair value, the difference between it and fair value should not be so great, p. 8.

[August 10, 1928.]

**APPLICATION of a telephone company for authority to increase rates for service; rates adjusted, modified increase allowed.
P.U.R.1928E.**

Appearances: Tremain & Turner, Greensburg, Cullen B. Barnes, Seymour, John S. Powell, Indianapolis, for petitioner; Frank Hamilton, Greensburg, for city of Greensburg; C. E. Wickens, Greensburg, for minority stockholders.

By the Commission: On April 5, 1928, Decatur County Independent Telephone Company filed with the Public Service Commission of Indiana its petition which, omitting formal parts, was as follows, to-wit:

"Decatur County Independent Telephone Company respectfully represents and shows to the Public Service Commission of Indiana :

That said Decatur County Independent Telephone Company is an Indiana corporation engaged in furnishing telephone service to patrons in Greensburg, Decatur county, Indiana, and vicinity and as such is a public utility subject to the jurisdiction of the Public Service Commission within the purview of the Shively-Spencer Utilities Commission Act of 1913;

That the present rates charged to the patrons of said Decatur County Independent Telephone Company are unreasonable, insufficient, unjustly discriminatory, and too low and do not yield an amount sufficient to cover reasonable operating expenses, reasonable depreciation and a reasonable return on the fair value of its property;

"Your petitioner would further respectfully represent and show:

"That its proper charges for service are not, in many cases, paid promptly when due and that a collection expense is thereby necessary, which is altogether unjustifiable and results in discriminatory practices, and is unjust to those patrons, who do faithfully and promptly meet their charges;

"It is just, equitable, and reasonable that a discount be allowed for prompt payment to the end that the expense occasioned by delay may be proportionately borne by those who occasioned such expense.

"Your petitioner would further represent and show:

"That the Decatur County Independent Telephone Company now maintains free interexchange service with the following P.U.R.1928E.

exchanges: Millhousen, Zenas, Alert, New Point, Milroy, and New Salem;

"That the giving of free service results in needlessly taking up the time of operators, the holding of the lines for long periods of time in purposeless visiting by subscribers located in distant parts of Decatur county and adjoining counties, service complaints caused by poor maintenance of connecting lines and unwarranted delays to the subscriber who has business to transact and is willing to pay a reasonable charge for good service;

"That the present free interexchange service is unreasonable and discriminatory and in effect renders telephone service to patrons of other exchanges at the expense of subscribers of the Decatur County Independent Telephone Company;

"That it is just and reasonable that the following toll charges established by the company be approved by the Public Service Commission of Indiana to be effective when, as, and if approved by said Commission;

"Clarksburg to Millhousen	10¢
Clarksburg to Zenas	10¢
Clarksburg to Alert	10¢
Clarksburg to New Point	10¢
Clarksburg to Milroy	5¢
Clarksburg to New Salem	5¢
"Letts to Millhousen	10¢
Letts to Zenas	5¢
Letts to Alert	5¢
Letts to New Point	10¢
Letts to Milroy	10¢
"Westport to Millhousen	10¢
Westport to Zenas	5¢
Westport to Alert	5¢
Westport to New Point	10¢
Westport to Milroy	10¢
"Greensburg to Millhousen	10¢
Greensburg to Zenas	10¢
Greensburg to Alert	10¢
Greensburg to New Point	10¢
Greensburg to Milroy	10¢

"Your petitioner would further represent and show:

"That it has caused an appraisal of its property to be made by an appraisal engineer and an audit of its books to be made by a certified public accountant and that copies of these reports will be filed in duplicate with the Commission as soon as same are completed.

P.U.R.1928E.

"Wherefore your petitioner herein respectfully prays that the Public Service Commission of Indiana make such investigations and hold such hearings as may be necessary and as a result of such investigations and hearings by its order find the fair value of the property of the petitioner used and useful to the public and authorize said Decatur County Independent Telephone Company to charge and collect a schedule of rates, which will yield an amount sufficient to pay reasonable operating expenses, reasonable depreciation, and a reasonable return on the fair value of the property, and assure prompt payment by patrons and afford such other relief as the Commission may deem just and proper."

Pursuant to notice by mail to all interested parties and publication of notice as required by law the above entitled cause was heard on July 9, 1928 at 10 A. M. in the court house, Greensburg, Indiana.

On behalf of the petitioner evidence was introduced tending to show that from 7 per cent to 10 per cent return on the fair value of the property used and useful was a reasonable return for a company such as Decatur County Independent Telephone Company and that 7 per cent was the lowest return which would permit the sale of its securities on the market.

The Commission, having caused its accounting department to make an audit of the books and records and its engineering department to make an appraisal of the used and useful property of the company, counsel for the company stated that petitioner desired to offer both exhibits in evidence, it being understood that they were Commission exhibits to which petitioner offered no objection, and that they were introduced thus early in the proceeding so that protestants might have ample opportunity to cross-examine the Commission experts. The appraisal of the engineering department on the basis of cost of reproduction depreciated as of May 1, 1928, including going value and working capital, was \$387,755. The Commission engineer, however, testified that, in his opinion, the fair value of the property was \$325,000, saying that certain considerations concerning the type of switchboard was the basis of his finding a lower fair value than the appraised value.

Mr. Earl Carter, consulting engineer on behalf of the com.
P.U.R.1928E.

pany identified his appraisal made as of May 1, 1928, and testified that the total cost of reproduction, depreciated, for all physical property plus going value but without working capital as of May 1, 1928, was \$354,643 and that in his opinion the fair value of the property was \$360,000 as of that date.

The evidence shows that this company was incorporated under the laws of Indiana June 20, 1900, with an authorized capital of \$30,000 divided into 1200 shares of the par value of \$25 each. The present majority stockholders obtained control and assumed active management of the company about February, 1927. The outstanding stock is held by approximately 300 stockholders. The majority of the shares of stock of the company are held by the following named persons: L. C. Griffitts, 834 shares; John F. Kent, 1 share; E. S. Welch, 1 share.

Through the testimony of Mr. L. C. Griffitts, some evidence was obtained as to the purchase price of the stock. Mr. Griffitts testified that a number of years ago he had paid \$5 a share for some shares of stock in the company and that during the years the price had increased until he had paid as high as \$160 a share for some of it. He stated that he was unable to testify as to the average price he had paid for all of the stock he now owns. In 1926, he testified, he paid \$50 a share for some of it and one or two shares at \$60 a share. That he had paid \$160 a share for the Ryan and Miller stock. That he had paid Max Hosea \$100 a share for 42 shares on July 1st, last year. Mr. Griffitts testified that he had purchased about 532 shares of stock from Miller and Ryan. It appears from the evidence that more than half of the stock now owned by the present majority stockholders was purchased at \$160 a share.

The minority stockholder's Exhibit # 1, being a letter addressed to the stockholders of the company, over the signature of Tremain & Turner, attorneys for the company, dated June 30, 1927, carried a flat offer of \$50 per share for any and all stock in the company. The evidence indicated that some stock was sold at this figure.

The fair value of petitioner's property is a complicated question. There has been a contest for control of the company's stock in recent years. This contest has been attended by much bitter-
P.U.R.1928E.

ness. When the owner of the majority of the stock confesses that he paid the varying prices for common stock suggested above; when this fact is contrasted with the subsequent offer of \$50 per share by the same party for minority stock, it must be concluded that the value of the stock per share was without limit, almost, until control was secured, and that the depreciation of that value for minority shares was equally striking after control had been gained. The transactions bore all the marks of speculation. Thereby the Commission must be warned in determining fair value.

[1] For taxing purposes the Board of State Tax Commissioners fixed \$157,525. This would indicate an actual value of approximately \$197,000. This sum is in substantial agreement with the net value of the stock, if computed at \$160 per share —\$192,000. Add to this the outstanding securities and the total is a little less than \$250,000. The Commission regards these facts as evidence of value, though not controlling.

The fixed capital of the company is \$263,308.99 as of December 31, 1927, and \$264,970.49 as of March 31, 1928. This is in approximate accord with evidences of value set forth in the preceding paragraphs and suggests that the purchase of the majority of the stock may have been guided by the fixed capital account.

[2] But the tendency of the time is to obtain maximum value, though the law requires this Commission to determine fair value. By the term fair value the Commission believes the law intends a value the rate of return from which will be fair and reasonable to the owners of the utility property and fair and reasonable for the patrons of that utility as a base upon which to pay rates for service. What the property is worth to its owners and what the service is worth to the patrons are of equal moment to the parties and must be determined by this Commission in determining fair value as a basis for rates.

The Commission's engineering department testified that the appraisal of the property, including working cash capital, materials and supplies, and going value, was \$387,755; that the fair value was \$325,000—a reduction of \$62,755 from appraisal of cost to reproduce to fair value. If appraisal of cost to repro-

P.U.R.1928E.

duce has great influence in determining fair value, the difference between it and fair value should not be so great.

[3] But this appraisal included \$45,000 for going value, which is more than eleven and six-tenths per cent of the appraisal depreciated, in which the going value was included. While a per-cent basis for computing going value is regarded by this Commission as unsound, the test in the instant case shows the amount arrived at to be indefensible.

The estimated cost to reproduce the general equipment and the bare bones of the property, exclusive of overheads, was \$282,615, depreciated. Add overhead construction costs depreciated, \$44,472, and the total is \$327,087—very near to the fair value testimony referred to above.

[4] However, the construction overheads include \$12,529 for engineering during construction. It seems reasonable that two-thirds of this amount was never paid for engineering. This property was not built by contract, but was built from time to time as required. Why reproduce this item, at least two-thirds of which had never been expended?

Construction overheads included \$12,440 for interest during construction. The company issued 1200 shares of common stock, with a par value of \$25 per share, in June, 1900, representing \$30,000 and now has a surplus of \$137,678.71. These two facts refute the theory of interest during construction, and convince this Commission that the reproduction of that item is wholly erroneous.

General supervision during construction is another item in the sum of \$5,931. There is no showing that general supervision cost was incurred and the Commission believes this cost was paid annually in operating expenses, as the several parts of this property were built. In the absence of such showing the patrons should not be required to pay a return on that item.

Taxes during construction and other items entering into this total of \$44,472 are open to similar objections and to similar reasons for exclusion from the rate base, to such extent as they are not sustained by the history of the company.

Earl Carter, appraisal engineer, offered in evidence appraisal of cost of reproduction at \$42,028 more for the entire property P.U.R.1928E.

than the appraisal offered by the Commission's engineers. His theory was similar, his allowances were similar, the items of property included in the two appraisals were comparable, if not exactly similar, yet his estimated cost to reproduce the property is more than fourteen and eight-tenths per cent higher than the corresponding estimate by the Commission's engineers.

[5] These two appraisals do not check with each other as nicely as do the value of the common stock, estimated at the prices paid for it, and the capital investment account. It would appear, therefore, that the investor in the stock is a much safer guide than the estimates of engineers. The Commission believes the determination of fair value should be based upon the prices paid for common stock, in part; upon the appraisal for taxing purposes, in part; upon the invested capital account, in part; and upon the appraisals made by engineers, in part.

As a part of the appraisal, the Commission engineers appraised the cost to reconstruct the switchboard at \$83,998; \$64,048 depreciated; \$4,200, junk value.

Earl Carter, consulting utility engineer, appraised cost to reproduce the same equipment with same equipment of present-day construction at \$81,134; same depreciated, \$36,510; condition, 45 per cent, as against per cent condition of 75 estimated by Commission engineers.

Carter's estimated cost to replace was \$2,864 less than estimate by Commission engineers; depreciated, Carter was \$27,538 less than Commission engineers' estimate. When experts indulge in such wide differences in their estimates, the Commission must look to some other source for guidance in determining fair value of the property. Again we find value in the facts as to money paid and money accepted for the common stock by willing purchaser and willing seller; in the book cost, amount shown in invested capital account and valuation for taxing purposes. Of course, the amount of bonds and other obligations outstanding must be considered in connection with these facts.

The Commission's audit, page 11, shows reserve for accrued depreciation and an analysis thereof. The balance in this reserve as of December 31, 1926, was \$62,795.62. The balance as of December 31, 1927 was \$67,121.01. The balance as of March P.U.R.1928E.

31, 1928 was \$68,890.40. Renewals and replacements were charged to reserve during the period from July 1 to December 31, 1926, amounting to \$3,538.35. Renewals and replacements charged to reserve during the year 1927 amounted to \$8,133.30. Renewals and replacements charged to reserve during the period January 1 to March 31, 1928 amounted to \$1,734.74. Depreciation has been accruing and charged to operating expenses at the rate of 5 per cent per annum on the depreciable property and plant as at the first of each month as shown in the discussion of the basis for depreciation computations, pages 23 and 24 of the Commission's audit.

[6] It is the opinion of the Commission, in view of the substantial reserve for depreciation showing upon the books of the company, that a charge of 5 per cent per annum for depreciation by this company is excessive and that the evidence, after a consideration of the various classes of depreciable property, warrants the establishment of a composite rate of 4 per cent per annum on the depreciable property and plant, as shown by the Commission audit.

From July 1, 1926, to March 31, 1928 (a period of twenty-one months), after deducting all charges made by petitioner against depreciation reserve account, a net increase in this reserve amounted to \$8,243.52, or an average of \$392.50 per calendar month for the period. A rate of 4 per cent would have provided an excess of \$314.50. This sum would have been more than reasonable. It is not fair to require patrons to build up any excess in this fund above requirements.

The schedule of rates and charges proposed by petitioner were applied by petitioner's accountant to a regraded service. The regrading of the consumers' data was an estimate by the accountant (of course), such estimate may be accurate or inaccurate—which no one can know. The annual revenue shown by this estimate is \$5,323 less than the annual revenue shown by the application of the same rates to the consumers' data, actual under the present rates for the calendar year 1927; and \$5,608.15 less than a similar application to consumers' data actual for the year ending March 31, 1928.

[7] The Commission believes that regrading of service is not P.U.R.1928E.

justifiable in the absence of testimony by competent witnesses in the record as to the experience of similar telephone utilities under circumstances that are similar to the circumstances and conditions in the cause at bar.

For example, petitioner's accountant estimated that 52 business patrons now being served by individual line would discontinue the individual line service at the increased monthly service charge proposed and would demand a party-line service at a less monthly rate; also that some of the party-line business patrons would seek to change from 5-party line to 2-party line, at an increased monthly rate, the later being made available to patrons of petitioner for the first time in this order. Similarly he estimated that 126 patrons of individual line residence service would change to 2-party line service and that 99 patrons now served by 5-party line residence service would advance to the proposed 2-party line residence service.

The number of patrons at time of this inquiry is 2420. The difference in revenue by regrading and by applying proposed rates to consumers as they now are amounts to \$2.20 per year for each patron, whether class of service be changed or not. The Commission believes this showing is too favorable to the petitioner, though it does not question the good intent of the accountant. The speculation is too hazardous for the patron. It is a guess at best. It is a substantial argument against increasing the rates beyond the essential requirements, as shown by the record. The petitioner makes no plan to protect the patron (against overcharge) in case the imagined regrading does not actually occur.

Mr. Lawrence Carter, certified public accountant, on behalf of the company identified an exhibit prepared by him showing the rates proposed by the company and the effect of the proposed rates when applied to the station data set forth in the Commission's audit.

[8] On cross-examination the salaries of the various officers and their duties were brought out in detail and a comparison made between the payroll in 1926 and the same month in 1928. The testimony showed the payrolls to be fairly comparable as that of June, 1928, was slightly lower than that of June, 1926.
P.U.R.1928E.

Certain salaries shown are, in the opinion of the Commission, excessive and will not be allowed in their full amount as proper operating expenses.

[9] It was also brought out that the rate case expenses of a former cause were included in the amount which petitioner proposes to amortize over a period of years. The rates herein authorized are for a future period, the rate case expenses of the prior cause are nonrecurring items and they are not proper items to be amortized as part of the expense of this cause and will not be allowed.

[10] Petitioner has a switchboard in service that is extremely expensive to maintain. It is peculiar in operation as compared with other makes of modern switchboards. Cost of maintenance is more than five times as much as the maintenance of switchboards that serve adequately more patrons than petitioners serves. The excess maintenance is charged to operating expense and said excess amounts to not less than \$3,500 per year. Annual requirements are boosted by that amount more than they should be. Patrons must pay this excess maintenance in rates before return is available to the utility owners on the fair value of their property.

The Commission is convinced that the utility is obligated to furnish adequate service at reasonable cost or to pay this excess maintenance out of revenues available for return; that the excess maintenance charge on account of this switchboard should not be allowed as an operating expense; that the annual requirements of petitioner should be reduced by \$3,500 on this account, and it will be so ordered.

Annual requirements for maintenance of this board amounted to an average of more than \$6,000 per year for the five calendar years, 1923 to 1927, inclusive, or to \$6.99 per year per line equipped to the board. The usual cost for maintenance of other types of switchboard in similar telephone operations ranges from 76 cents to \$2.84 per year per line equipped. In the telephone fields thus compared the service is ample and adequate.

The record discloses that this board can be junked, another type of board substituted for it without injury to the service and with-

P.U.R.1928E.

out perceptible increase in traffic costs, and that the saving in maintenance costs would equal the cost of the new board in a period of not more than six years.

The company by its local manager offered evidence that the present free interexchange service was unreasonable and described the traffic difficulties, complaints and discriminatory service conditions arising therefrom.

The city of Greensburg and the minority stockholders introduced no affirmative evidence but through counsel cross-examined petitioner's witnesses at considerable length. Representatives of the Farm Federation appeared at the morning session but took no part in the examination of witnesses and did not attend the afternoon session of the hearing. The cross-examination on behalf of minority stockholders was concerned chiefly with the prices that had been paid for stock and offers to purchase and with matters of purely internal corporate policy and did not present any matter of which the Commission should take cognizance except that the books of the company are being kept at Seymour, Indiana. There was no complaint against the service rendered by the company at any of its exchanges.

[11] The evidence did not show clearly the amount which it is reasonable to presume would be realized annually from the establishment of inter-exchange toll rates in lieu of free service but the net return should be appreciable. A study of the toll revenues from long calls during the last three months under review shows a substantial gain. If this same gain were projected on an annual basis approximately \$2,000 additional revenues would be provided. The rates which the Commission proposes to fix and establish in this order, when considered alone, will yield approximately seven per cent on the fair value of the property. When the two additional toll earnings and additional earnings from desk sets are considered the total should make certain a 7-per cent return on the fair value of the property.

The Commission having heard the evidence and being fully advised in the premises finds:

1. That the present rates charged by petitioner are unreasonable and too low but that the rates proposed by petitioner are unreasonable and too high and the Commission will by this or-
P.U.R.1928E.

der fix just and reasonable rates in lieu of those proposed by petitioner.

2. The Commission further finds that officers' salaries of \$450 per month is excessive and that not to exceed \$300 per month for such salaries shall be considered as an operating expense in determining and fixing the rates which petitioner is permitted to charge.

3. The Commission further finds that rate case expense of a previous cause is not a proper item of expense to be amortized in the rates provided in this cause and such items will not be allowed.

4. The Commission further finds that petitioner shall be allowed to keep its books and records in such place within the state of Indiana as its directors deem best but that none of its books of account or records shall at any time be removed from the state unless so ordered by the Commission.

5. The Commission further finds that \$5,316.69 is reasonable rate case expense in this cause to be amortized over a 4-year period.

6. That the fair value of petitioner's property at time of this investigation is \$305,000, including \$25,000 for going value, \$3,500 for cash working capital, and \$11,000 for materials and supplies.

7. That cost of maintenance of switchboard now in use is excessive as a charge to operating expenses.

8. That the patrons should not be required to pay as an operating expense more than \$3 per annum for each line equipped, the number of lines now equipped being 900, as shown by calculation made by the Commission's engineering department for the use of the Commission in this cause.

9. That the fair value of utility property should be neither the maximum amount obtainable by the cost of reproduction depreciated, nor the minimum amount obtainable by the price paid for common stock, etc., but rather a judgment of value after thorough consideration of all evidences of value heretobefore referred to.

10. That the large balance in the reserve for accrued depreciation in petitioner's property, together with the amounts used by P.U.R.1928E.

petitioner to meet depreciation requirements during recent years, more than warrant a rate of depreciation of not more than four per cent per annum.

11. That the schedule of rates and charges for service set out below will be adequate to meet all proper requirements, and to pay a return on the fair value of the property of approximately seven per cent per annum.

Said schedule of rates, when applied to the existing consumers' data, will yield a return of $6\frac{1}{10}$ per cent on the fair value, exclusive of revenues that will accrue from toll charges authorized in this order.

If petitioner's accountant, Lawrence Carter, is correct in his scheme of regrading the service following an increase in the rates, then his rates proposed will yield \$2,120.50 per year more than the above rates will yield, exclusive of revenues from toll charges authorized by this order; and said yield will exceed seven per cent return by approximately one thousand five hundred dollars, again excluding toll revenues authorized herein.

Harmon, McIntosh, Singleton, Commissioners, concur; McCardle, Commissioner, concurs except in amount allowed for depreciation; Ellis, Commissioner, not participating.

WISCONSIN RAILROAD COMMISSION.

RE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY.

[R-3482.]

Return — Percentage allowed — Street railways.

1. A street railway company upon purchasing another line showing a return of 1.68, 1.03, and 2.01 per cent for three successive years was permitted to increase fares in conformity with its own system, which showed returns of 5.07, 4.32, and 4.44 per cent during the same period where patrons all over the city would enjoy free inter-transfer privileges, p. 17.

Discrimination — Street railways — Higher rate for return trip.

2. The fact that a continuation of a transfer agreement between two traction lines, one of which has been permitted to increase fares, P.U.R.1928E.

will result in a passenger going in one direction to pay more than a passenger making the return trip, was held not to be unjustifiably discriminatory in view of the two-way traffic usually on such connection, p. 17.

Rates — Reasonableness — Uniformity not controlling.

3. A street railway is entitled to an adjustment of its rates where it is operating without earning a reasonable return upon the value of its properties irrespective of the attitude of a competing company, especially where the continuation of a certain fare on a newly acquired line would result in discrimination against the rest of its system, p. 18.

Service — Street railways — One-man cars.

4. The use of one-man safety cars on cross-town lines was held to be consistent with reasonably adequate and safe service, p. 18.

[August 10, 1928.]

APPLICATION of a street railway company upon acquiring a new line to increase fares in conformity with the rest of its system, to discontinue certain transfer privileges, and to use one-man cars on certain routes; increase allowed, transfer privilege ordered to be continued, and one-man car operation authorized.

By the **Commission:** By an order dated November 30, 1927, P.U.R.1928B, 345, and a supplementary order dated April 14, 1928, the Railroad Commission of Wisconsin authorized the merging of the Milwaukee Northern Railway Company with the Milwaukee Electric Railway & Light Company. On December 16, 1927, the Milwaukee Electric Railway & Light Company filed with the Commission an application for an order to be effective upon the completion of the proposed merger authorizing the application of the same rates of fare and universal transfer privileges on the system formerly operated by the Milwaukee Northern Railway Company as now prevail on the other lines of the applicant in the city of Milwaukee. The application further requests authority to discontinue the exchange of transfers with the Chicago & Milwaukee Electric Railway Company and to operate a new through cross-town line by routing the First avenue branch of its Vliet-Howell avenue line westerly from Third street in Milwaukee on State street to Sixth street, thence north over the line of the Milwaukee Northern Railway Company to the turning loop at which Milwaukee Northern Railway Company's local service now terminates and P.U.R.1928E.

returning by the same route and the operation of such cross-town line by one-man safety cars upon a maximum headway of 8.4 minutes during nonrush hours.

A hearing was held at Milwaukee on July 19, 1928. The applicant was represented by James B. Shaw, the Chicago & Milwaukee Electric Railway Company by Edgar L. Wood, the city of Milwaukee by Assistant City Attorney W. J. Mattison, and W. H. Park appearing on his own behalf.

[1] Testimony was introduced indicating that the applicant company on its street railway and auxiliary bus system in Milwaukee during the year 1926 earned a return upon the value of its property of 5.07 per cent, and in 1927, 4.32 per cent. During the first five months of 1928 the return was 4.44 per cent. During the same years, the Milwaukee Northern combined interurban and urban service yielded a return of 4.45 per cent in 1926; 3.80 per cent in 1927, and for the first five months of 1928, 3.63 per cent. During the same years the Milwaukee Northern city service yielded a return of 1.68 per cent in 1926; 1.03 per cent in 1927; and for the first five months of 1928, 2.01 per cent.

The company proposes, if granted permission to apply its city rate schedule to the Milwaukee Northern operation, to give this line the benefit of universal transfers to its other city lines which has not been hitherto enjoyed. The establishment of the cross-town service as proposed will also give patrons of this line direct connection on a single fare with the southern portions of the city, together with transfer privileges to other lines in that part of the city.

[2] The Milwaukee Northern Railway Company has for many years had a transfer arrangement with the Chicago & Milwaukee Electric Railway Company which operates urban service over a line extending through the southern portion of the city. The Chicago & Milwaukee Electric Railway Company operates on a 5-cent fare basis and because of this discrepancy between the proposed fare schedule on the line formerly operated by the Milwaukee Northern Railway Company and that of the Chicago & Milwaukee Electric Railway Company, the applicant proposed in the original application to dis-

P.U.R.1928E.

continue this transfer arrangement. At the hearing, however, the two companies indicated their willingness to continue the transfer privilege between their respective lines as it has formerly existed. To so continue the arrangement would mean that a person traveling from a point on the old Milwaukee Northern system to a point on the Chicago & Milwaukee Electric system would pay a higher rate than a passenger making the same trip from south to north. It was pointed out, however, that since city travel is largely two-way travel,—in other words, that a passenger going in one direction usually returns over the same route,—there would be no unreasonable discrimination between patrons of the two lines. It was urged by witnesses that the proposed arrangement would be discriminatory, but the testimony fails to disclose any conditions which would result in unjustifiable discrimination.

[3] Some objection was made to the proposed increase in fares on the Milwaukee Northern system, on the ground that that company had continued operation at a low rate of fare for many years and that the Chicago & Milwaukee Electric Railway has also so operated on a 5-cent fare and proposes to continue to do so. However, the statistics offered clearly indicate that the city system of the Milwaukee Northern has been operated in the past without earning a reasonable return upon the value of the property used and useful for the public, and under such circumstances the applicant is entitled to an adjustment of its rates, irrespective of the attitude of a competing company. Moreover in view of the fact that the Milwaukee Northern system is now to be operated as an integral part of the applicant's system, it would result in unjustifiable discrimination for it to operate this line at a different rate of fare than that applicable to its other city lines similarly situated.

[4] The testimony does not disclose any situation on the proposed cross-town line which would impair the rendering of reasonably adequate and safe service thereon by the use of one-man safety cars, as proposed, and the Commission is satisfied from its previous investigations of the operation of such equipment that the use of one-man safety cars on the proposed line is consistent with reasonably adequate and safe service.

P.U.R.1928E.

The Commission finds that the existing rate schedule on the applicant's system is reasonable as applied to the system of the Milwaukee Northern Railway Company upon the completion of the merger of that system with the applicant's property, and that the establishment of universal transfer privileges between said Milwaukee Northern line and the other lines of the applicant is in the public interest; further that the continuance of the transfer privilege between the said line of the Milwaukee Northern Railway Company and the urban system of the Chicago & Milwaukee Electric Railway Company, as proposed at the hearing, is in the public interest; and that the operation of a new through cross-town line as proposed and the use of one-man safety cars thereon is consistent with reasonably adequate and safe service.

NEW YORK DEPARTMENT OF PUBLIC SERVICE, STATE DIVISION, PUBLIC SERVICE COMMISSION.

RE CONSOLIDATED GAS COMPANY OF NEW YORK.

[Case No. 4991.]

Consolidation, merger, and sale — Reasons for approving — Gas and electric.

1. The consolidation of a gas and electric company operating in a large metropolitan area was approved upon proof that the resulting unified management, policies and practices would enable future financing to be more advantageous to all parties as well as to keep pace with city growth, produce great economies in location of generating stations, as well as capital expenditures and operating expenses, besides reducing rates and eliminating current rate differentials, p. 23.

Consolidation, merger, and sale — Duties of Commission — Benefit of public.

2. It was the attitude of the Commission in determining an application for a consolidation of public utilities that the application should be rejected unless it was affirmatively shown to be in the public interest of the consumers, p. 35.

Consolidation — Conditions — Elimination of competition.

3. It is not necessary to write into a consolidation plan as a condition to its approval, any equivalent for the competition which is thereby eliminated, in view of the continuing regulation which will protect the people from the inertia of a monopoly, p. 36.

P.U.R.1928E.

Rates — Reasonableness — Comparisons — Necessary factors.

4. Lighting rates of one city cannot be determined per se by a comparison with the rates of another city unless all the factors affecting the costs of doing business such as local ordinances, topography, prices of supplies, and labor rates are the same, p. 36.

Consolidation — Size no objection — Hydro power domination.

5. The contention that the high proportions of a proposed merger will permit domination in the state resulting in the exploitation of water power cannot be considered where the petition is not concerned with the use of the state's water power, p. 36.

Consolidation — Calculation of alleged economies unnecessary.

6. It is unnecessary for consolidating companies to compute in advance the exact amount of rate reduction to be expected from economies resulting from the proposed coalition where some saving will unquestionably be effected, p. 38.

Consolidation — Not a rate proceeding.

7. Consolidation proceedings cannot be transformed into a rate case merely because of a marked increase in the market value of the securities involved, p. 38.

Rates — Reduction as part of consolidation proceedings.

8. An ex parte and immediate reduction in domestic lighting rates as part of a proposed consolidation program between a gas and an electric company was disapproved in view of the necessity in such event of draining reserves, reducing dividends, the inadequate period upon which rate observations were based, as well as the resulting discrimination to power users, p. 39.

Security issues — Market value — Consolidation exchange.

9. The use of exhibits based upon market quotations as tests of the value of stock to be exchanged in a consolidation program between a gas and an electric company or of the value of assets thereby represented was held to be an inadequate basis in view of the foreign factors such as stability, money cost, rate of return, and hope of enhancement which are reflected in such quotations, p. 41.

Security issues — Purchasing company — Amount.

10. Where the capital stock of one utility is purchased by another, any securities issued by the purchasing corporation should be substantially on the same basis that controlled the issue sought to be acquired, p. 43.

Commissions — Concurrence to end tie vote.

11. One half of the voting members of the Commission finally concurred in the approval by the other half of a proposed utility consolidation where the likely absence for illness of the deciding Commissioner would tie up much capital to the injury of innocent stockholders if the matter were held open in deference to the wishes of the state's governor that certain parties, whose evidence could not affect the result, be given additional opportunity to be heard, p. 44.

Rates — Experimental observation — Electricity.

Statement that it is rarely advisable to form an opinion of a utility's financial condition or possibilities on the results of a period less than one year, p. 39.

Procedure — Public hearing — Germane testimony.

Statement that the term "public hearing" does not mean that all persons, whether or not they have anything germane to offer, are entitled to be heard at length in a proceeding, p. 44.

[August 9, 1928.]

(Commissioners VAN NAMEE and LUNN concur in the result.)

PETITION of a gas company operating in the metropolitan area of New York city to consolidate with an electric company also operating in such area through the purchase of all outstanding capital stock of the latter; approved.

Appearances: Shearman & Sterling, New York city (by John A. Garver, and P. F. W. Ruther), appearing for the petitioner; George P. Nicholson, Corporation Counsel (by Judson Hyatt, Assistant Corporation Counsel), city of New York; Hays, Hirshfield & Wolf, New York city (by Morris L. Ernst), appearing for the Public Committee on Power, state of New York; Peters & Peters, New York city (by Mr. Jeffe), representing commercial and wholesale users; D. M. Carr, appearing for the Electric Club of Brooklyn, Inc., Brooklyn.

By the Commission: Hearings in this case were held at the New York office of the Commission July 18 and 25, 1928. At the first hearing there were present Chairman Prendergast, Commissioners Pooley and Van Namee; and at the second hearing Chairman Prendergast and Commissioner Van Namee.

The Consolidated Gas Company of New York proposes to acquire the outstanding common capital stock of the Brooklyn Edison Company by giving in exchange for each of the 900,000 shares of the stock of that company, having a par value of \$100, two shares of its new common stock without par value and one share of its \$5 cumulative preferred capital stock without par value.

The petition sets forth, among others, the following statements:

"The basis of the proposed exchanges of stock is the result of much careful study, and it is believed to be fair to the stockholders."

P.U.R.1928E.

ers of both companies. In reaching a definite conclusion, there was taken into consideration the book values of the respective shares, their market values, the earning power per share of each company, the present value of their respective properties, and the prospective operating advantages of each. An earnest effort has been made to make this exchange of stock on an absolutely just and equitable basis."

"The Brooklyn Edison Company's operations are carried on throughout the county of Kings. It adjoins the territory supplied by the New York & Queens Electric Light & Power Company, in excess of 90 per cent of whose stock is owned by the petitioner. Your petitioner also owns all of the capital stock of the New York Edison Company, which in turn owns substantially all of the capital stock of the United Electric Light & Power Company. Both of the last named corporations carry on their operations in the boroughs of Manhattan and Bronx. Petitioner also owns all of the capital stock of the Bronx Gas & Electric Company, which carries on its operations in that portion of Bronx county, formerly comprising the old town of Westchester. Petitioner also owns all of the capital stock of the Westchester Lighting Company, which operates in the county of Westchester, and certain portions of Bronx county. The facilities owned by these various corporations are closely connected; and it is highly desirable that a closer connection should be made with the Brooklyn Edison Company, so that no part of the city of New York will at any time be without electrical energy as the result of accident or other contingency.

"As the city expands and additional generating plants and stations are required, such additional facilities can be located so as to serve the needs of all companies at a minimum cost. Duplication of plants will thus be avoided and the most efficient plants can be utilized to their full capacity, while unification of service will necessarily result in economies that will redound to the benefit of the public. Greater uniformity will be possible in the establishment of rates if the Brooklyn Edison Company is brought under a central control, and purchase of materials and supplies can be made under more favorable conditions."

There was filed and admitted as Exhibit No. 2, a certified P.U.R.1928E.

copy of resolutions unanimously adopted at a special meeting of the stockholders of the Consolidated Gas Company of New York, on July 16, 1928, under which the company was authorized to acquire, subject to the authorization of this Commission, all or any part, but not less than seventy per cent of the outstanding capital stock of the Brooklyn Edison Company, Inc., and it was stated by counsel for the petitioner that at such stockholder's meeting there was represented more than seventy-six per cent of the entire capital stock of the company.

The record also shows that 810,000 shares of the 900,000 shares of common capital stock of the Brooklyn Edison Company outstanding have been deposited with a committee of three authorized to receive the deposits of the capital stock of the company, and that the president of the Brooklyn Edison Company had promises to deposit from stockholders who are absent from the city and who have their stocks in safety deposit vaults, to the extent of approximately 50,000 shares of the remaining 90,000 shares. The committee is continuing its solicitation of the balance of the outstanding stock and is receiving favorable replies.

The petitioner called four witnesses, Mr. George B. Cortelyou, president of the Consolidated Gas Company of New York, Mr. Matthew S. Sloan, president of the Brooklyn Edison Company, Inc., Mr. Nicholas F. Brady, president of the New York Edison Company and the United Electric Light & Power Company, and a member of the board of directors and executive committee of the Brooklyn Edison Company, and Mr. F. H. Nickerson, chief statistician and assistant secretary of the Consolidated Gas Company of New York.

The testimony is in general as follows:

[1] The development in the public utility field, as in other industries, has been toward the consolidation of corporations into larger single units because of the opportunity afforded for more satisfactory operation and increased service. It is essential to giving the city of New York the highest grade of service that unified management should be adopted, carrying with it uniform policies and practices in operation. Such unified management will enable future financing in conformity with the P.U.R.1928E.

great growth of the city of New York. Under such management provision can better be made for the construction of property located and highly efficient generating stations and distribution systems so that different localities may be supplied with electricity by the shortest routes. Routes for the distribution systems should be planned in conjunction with other city improvements. It should be the purpose of such unified management to secure the necessary duct space in the new subway systems connecting the borough of Manhattan with the boroughs of Brooklyn and Queens, in order to avoid the necessity of continually working in the streets of the city to the great disadvantage of traffic and the general discomfort of the public, and the great extra expense to the companies. The drift of population has almost tended to destroy the effect of borough lines, as in the cases of Brooklyn and Queens. These two boroughs are served by different electrical companies, whose distribution lines meet at the borough line, but do not cross. Therefore, these two companies are serving what is practically identical territory, the effect being to unnecessarily increase capital investment and maintenance expenses.

The president of the Brooklyn Edison Company stated that in his opinion practically all of the residents in the borough of Queens could be more economically and satisfactorily served from the stations of his company, and all operations in connection with such service could be more efficiently and satisfactorily conducted by one organization. A great deal of the electrical load required for the downtown district in Manhattan borough, below the Brooklyn bridge, could be more efficiently supplied from the power plants of the Brooklyn Edison Company because of their location than from the plants of the New York Edison and United Electric Light & Power Companies. He also stated that about two years ago, the Brooklyn Edison Company purchased for approximately \$800,000, a tract of land on Butter-milk channel in the borough of Brooklyn. This particular property is admirably located for an electrical plant because of an abundance of clear, clean, deep water, a requirement which is vitally necessary for the operation of a modern and efficient power station.

P.U.R.1928E.

The property is also outside the congested districts of Brooklyn, but convenient to the labor market, and the coal ports. A plant so located could be utilized for the benefit of consumers in the borough of Manhattan where property is very valuable, where construction is necessarily constricted. The Brooklyn Edison Company has a tie line at the present time in the 14th street subway, which connects the boroughs of Brooklyn and Manhattan, and is capable of carrying approximately thirty thousand kilowatts, but this connection is only used in cases of emergency and breakdowns and is not in *general* use for the advantage of the consuming public. If the electrical companies in the Consolidated Gas Company's system and the Brooklyn Edison Company are brought under common management, the efficient power plants of the last mentioned company can furnish electricity to Manhattan, Queens, Bronx, and Westchester.

Another advantage to a common control of all these properties is that in the development of the city, stations can be located at the most advantageous points for the use of the entire city, the interconnection of these various power stations making possible a considerable saving in power house maintenance. Common control would also produce economies in administration, financing, engineering, construction, and purchasing and would have a tendency to provide a more uniform rate for service throughout the entire city. The Brooklyn Edison Company has made reductions in rates during the last five years which has saved its customers in Brooklyn approximately \$8,000,000. With unification there should be a saving of \$3,000,000 annually in operating expenses.

The president of the Consolidated Gas Company of New York testified that great economies in operation and corresponding advantages to the public had been secured by common ownership and control of the gas companies which are part of the Consolidated System. As an instance, he cited the generating plant at Astoria, Long Island, which site was selected on account of its remoteness from the residential section of the city, and from which gas is sent across the East river and made available for the other gas companies of the system. By reason of trunk line P.U.R.1928E.

connections there is insured an unfailing supply of a uniform quality of gas materially reducing the cost to the consumer.

The new plant at Honts Point is one of the largest and most efficient plants in existence. Gas produced there is now made available to the other companies in the system and also for service in Westchester county, resulting in the disuse of several of the small plants of the Westchester Lighting Company during the summer months, enabling them to be put into more efficient operating condition for the winter months.

In the location of additional generating stations for the New York Edison Company, the demands upon that company are considered in connection with the demands on all the electrical companies. As the New York Edison Company and the United Electric Light & Power Company represent practically a single interest, their requirements are considered together when planning additional facilities. This is also true of the New York & Queens Electric Light & Power Company, which obtains its current largely from the United Electric Light & Power Company, increasing the operating efficiency of the plant of the latter company and rendering unnecessary large capital expenditures by the Queens Company. The new generating plant of the New York Edison Company on East 114th street can supply current to the other electrical companies, including the Brooklyn Edison Company.

The constant growth of the city renders necessary increased electrical facilities and this service can be supplied more economically if the Brooklyn Edison Company were operated as part of a general electrical system for the entire city, as all other electrical companies in the city have been acquired by the Consolidated Gas Company, the acquisition of the Brooklyn Edison Company may be considered a final step in a central control of the electric supply of the city.

The gas and electrical companies in the Consolidated System are required to prepare annual budgets, which are carefully examined by a general budget committee resulting in a consolidated budget for all companies.

Economies have been made in the operation of the gas and electrical companies in the Consolidated System in connection
P.U.R.1928E.

with their financial requirements. The subsidiaries, if acting alone, could have secured the necessary capital only at much greater cost. The Consolidated Company has advanced the necessary capital and in most instances has taken capital stock in payment. The Consolidated Gas Company has been able to finance large capital expenditures on terms far more advantageous than the individual companies could have secured. The same principle will apply, though not in such marked degree, in the case of the Brooklyn Edison Company.

There have been savings in the operation of the gas and electrical companies through centralized purchase of materials and supplies, especially in the case of coal and oil. The present purchasing power of the Consolidated Gas Company would be further enhanced if the requirements of the Brooklyn Edison Company were also to be taken into consideration.

By issuing two shares of its common stock and one share of \$5 preferred stock for each share of the Brooklyn Edison Company's stock, the Consolidated Gas Company of New York will be receiving full value for its stock. The basis of this exchange was unanimously recommended by the board of directors of the Consolidated Gas Company after the fullest consideration of the details of the subject.

It has been the policy of the Consolidated Gas Company to reduce rates as rapidly as is consistent with its duty to its stockholders. Within the past few years voluntary reductions have been made by the New York & Queens Electric Light & Power Company, the Bronx Gas & Electric Company and the Westchester Lighting Company, representing savings in the past and for the future of millions of dollars.

Mr. Nicholas F. Brady stated that he and his father's estate are substantial stockholders in the Consolidated Gas Company of New York and in the Brooklyn Edison Company. He is unconditionally in favor of the proposed exchange of stock as he considers the exchange would be in the interests of the public on account of the savings that can be made, both in operation and in investments. In respect to investments, savings can be made, as it will not be necessary to carry so much reserve equipment in the generating and power stations as would be necessary

P.U.R.1928E.

if the companies were separate entities. The size of generating units have increased materially and the companies are now adding units of over 200,000 kilowatt capacity. The largest unit in the Brooklyn Edison Company is about 70,000 kilowatts; and it is contemplated to install a unit of 110,000 kilowatts. The largest unit in the East River station at 14th street of the New York Edison Company is over 200,000 kilowatts. This represents an investment of \$100 per kilowatt or twenty millions of dollars. In the case of separated companies, each company has to maintain a reserve equal to its highest single generating unit. If a unification of the companies should be effected, this reserve could be reduced from 100,000 to 200,000 kilowatts, a capital saving of twenty million dollars. This would seem an operating saving of at least 10 per cent of that amount, taking into consideration interest, taxes, insurance, etc. Such a saving would be reasonably sure under central control. Through a consolidation of the companies concerned in this petition, very great opportunity would be afforded to run the most efficient stations a greater number of hours and improve their load factor. Such economies would be substantial, but it is not possible to make an offhand estimate of them. Further savings would be possible through the joint use of facilities such as coal storage yards, which are now required by all companies.

In Mr. Sloan's testimony he stated:

"Experience in operating public utilities all over the country has taught public utility executives that in the interest of continuous service to the public it is advisable and desirable to carry as reserve capacity, a unit equivalent to the largest unit existing on the system of the particular company supplying the service.

"In Brooklyn, we are now installing a unit of 110,000 kilowatt capacity.

"When that unit is installed, and if we continue to operate as a separate company, it will be necessary for the Brooklyn Edison Company to carry as reserve capacity, in one or more units, the equivalent of 110,000 kilowatts.

"If that 110,000 kilowatt unit fails in service, either on the
P.U.R.1928E.

steam end, or on the electrical end, we must have 110,000 kilowatts of capacity in reserve to take its place.

"The largest unit being installed or now in operation with the New York Edison Company, is approximately 160,000 kilowatts.

"The largest unit installed by the United Company, which is also a subsidiary of the Consolidated Gas Company, is 110,000 kilowatts I think, so that if you take the sum of all of the three maximum units installed in the three companies, it is the equivalent of approximately 400,000 kilowatts."

"If you take the aggregate of all these units and operate them as separate companies, it would be necessary to carry approximately 430,000 kilowatts of reserve capacity.

"If the systems are unified, and put under common control, the reserve capacity then necessary will be equivalent to only the largest unit on the entire system, which would be 210,000 kilowatts, to cover the failure of the largest unit of the New York Edison Company, which has or will have within six months, the largest unit on the system.

"So that you can avoid the installation of 200,000 kilowatts in capacity and that is calculated at \$100 per kilowatt which is a very low charge per kilowatt of installation capacity.

"In some cases it runs as high as \$117 or \$120 a kilowatt, but taking \$100 as a quick and ready figure for calculation, we will have a saving in capital investment on the entire system of approximately \$20,000,000.

"That \$20,000,000 capitalized at 15 per cent, including insurance, taxes, renewals, replacement reserves, and contingencies, give us a maximum saving of \$3,000,000.

"There would be decided advantages by connecting the various power plants together by tie lines, thereby permitting the companies to operate the most efficient units on the entire system as the base load units.

"As an instance, when the Brooklyn Edison Company completed the installation of the first three units in its Hudson avenue station, they were carrying 25 per cent of the gross kilowatt hour load of the Brooklyn Edison Company in 1924.

"Since 1924 we have by changes on our system, by the installation of frequency changers, and interconnecting devices between P.U.R.1928E.

these various stations, we have been able to increase the carrying capacity on the Hudson avenue station to take care of 75 per cent of the total of the load of the Brooklyn Edison Company, and in doing that we can actually point out in the records, or from our records, a saving in the cost of operation of \$2,143,-000.

"That the same condition can be applied to the unification of all the other plants, by putting the load on the most efficient units on the entire system."

In amplifying Mr. Brady's testimony regarding centralized coal-storage, Mr. Sloan said:

"The Brooklyn Edison Company has coal-storage facilities at Rossville on the Kill-von-Kull, close to the coal ports, where all coal is brought in, and if this consolidation is approved and made effective, there is no reason I can see why the Rossville yard of the Brooklyn Edison Company, close to the coal-storage ports can not be used for the common and joint use of all the companies using coal on the system of the Consolidated electric companies."

Summarized, the foregoing testimony is as follows:

(1) That the tendency in the public utility business is toward consolidation of companies and larger financing and operating units.

(2) That such consolidations carry with them unified management and uniform policies and practices.

(3) That the bringing together of the Consolidated Gas Company of New York and the Brooklyn Edison Company will enable future financing to keep pace with the growth of the city of New York.

(4) That unified control will tend to better and more economical service in that generating stations may be located with a view to extending service over larger areas.

(5) That unified control, as far as the physical development of the business is concerned, would correlate with better city planning.

(6) That under unified control economies in capital expenditures and operating expenses would be certain.

(7) That necessary capital financing could be done on terms more advantageous to the public and the company.

P.U.R.1928E.

(8) That enlarged purchasing facilities consequent upon unified control would tend to reduction in expenses.

(9) That unified control would obviate the rate differentials, that now exist in the electric services rendered in Brooklyn and Queens boroughs.

(10) That unified control would tend to reduce rates to consumers.

The above items 1 to 5, inclusive, state for the most part certain obvious facts or suggestions. It is undoubtedly true that the tendency of present day industrialism is towards consolidation, and quite axiomatic such consolidations carry with them unified management as well as uniform policies and practices, and also that a combination of the Consolidated Gas Company of New York and the Brooklyn Edison Company will insure more economical financing. It follows that such financing can be used to promote a development of the electric industry in New York city in accordance with the growth of this great municipality. The arguments used in the testimony concerning the placing of generating stations need no elaboration nor confirmation, and it is quite as true that as part of a better city planning, one controlling company will be a more serviceable agency for co-operation than would a number of unrelated concerns.

Unified control rightly administered must, unquestionably, make for economies in capital expenditures and operating expenses, the treatment of the latter being, to a great extent, influenced by the well-known advantages of extended purchasing possibilities, as compared with restricted buying. It is claimed by the petitioner that the necessary capital financing could be done on terms more advantageous to the public and the company, and as an evidence of this, Mr. Cortelyou explained how these advantages had been obtained in the present operations of his company. However, he very properly qualified his statement by saying that "the same principle will apply, though not in such marked degree, in the case of the acquisition of the Brooklyn Edison Company by the Consolidated Company." It is a fact that the credit of the Brooklyn Edison Company is very high and, at the same time, it is safe to conclude that a combination

of two concerns of high credit, could not fail to put such a combination of interests in even a stronger position than either individually might be in respect to their command of necessary credit.

In the testimony attention was called to the somewhat anomalous condition that now prevails in respect to services being rendered to the people of Brooklyn and Queens. On the boundary line between these boroughs are thickly congested centers of population. The result is that people on what is one side of a street are paying the rate of the Brooklyn Edison Company, 7 cents, and those on the opposite side are paying the rate of the New York & Queens Electric Light & Power Company, which is 8 cents. The Commission has been called upon during the past year to deal with this situation, which has, to some extent, been relieved by the reductions made in March, 1927, and July, 1928, by the New York & Queens Electric Light & Power Company, whose general consumer's rate has been reduced during that time from 9 cents to 8 cents. A co-ordination of these different interests, governed by correct principles of unified control, should undoubtedly lead, within a reasonable time, to an equalization of rates in these territories.

The testimony of the principals of the two companies concerned in the transaction covered by this petition, clearly indicates that it is their belief that unified control would tend to reduce rates to consumers. There is naturally inquiry as to how this will be brought about. The economies which have been set forth all point strongly in the direction of such a reduction.

The Commission is justified in taking notice of the fact that the Brooklyn Edison Company has made reductions in rates during the past five years which total some \$8,000,000. The New York & Queens Electric Light & Power Company has made reductions since 1924, which computed to July 1, 1929, being one year from its last reduction, represent savings to consumers of \$3,500,000. The Westchester Lighting Company has made reductions since March 1, 1926, which, computed to June 1, 1929, one year from the date when its last reduction went into effect, represent savings of \$1,250,000. The Bronx Gas & Electric Company has, since June 1, 1927, made reductions which, com-P.U.R.1928E.

puted to June 1, 1929, one year from the effective date of its last reduction, represent savings of \$325,000. These savings to consumers represent a total of approximately \$13,000,000, and all these reductions have been the result of negotiations between the Public Service Commission and the companies, the reduced schedules having been placed in force voluntarily without any of the delays attendant upon rate cases, or a dollar of expense to either the state or the company, which means the consumers.

It will be noticed that in this list of companies in the present Consolidated System which have made reductions, the New York Edison Company and the United Electric Light & Power Company, one of the largest electrical combinations in the country, there have been no reductions.

The public should be reminded that five years ago the city of New York brought a rate proceeding before the Public Service Commission against the New York Edison Company. It is estimated that \$5,000,000 have been spent by that company in making an inventory and appraisal of its property. Being required by law to bear the burden of proof, it concluded its case before the Commission in February, 1927. But since that time the city of New York, though repeatedly urged by the Commission to present its case, has failed to do so. This might be regarded as an illustration of the efficacy of intelligent regulation as shown by the reductions made by the Brooklyn Edison Company, the Westchester Lighting Company, the New York & Queens Electric Light & Power Company, and the Bronx Gas & Electric Company, as compared with the great delays incident to the prosecution of complaints as in the case of the New York Edison Company.

It is a fair conclusion from the Commission's own records, of which it is justified in taking notice, that reductions in rates can and will be accomplished where it is made plain that such reductions are possible.

With a view to testing the beneficial effects of unified control of the interests concerned in this petition, all the companies concerned will be directed to file with this Commission monthly statements of their revenues and expenses, and in the event of a P.U.R.1928E. 3

merger of these companies, the merged company will be required to do likewise.

Certain organizations and individuals appeared at the first hearing, but were advised that the Commission did not consider them proper parties to the case. This decision was made by a majority of the entire membership of the Commission which was sitting at that time. These organizations and individuals were informed that they could file briefs which would be considered. The parties referred to are as follows:

The Peoples Civic League of Brooklyn, represented by Hon. John F. Hylan, former mayor of the city of New York, who stated that he was present as an observer and at the second hearing informed the Commission (page 132 Min.) that he was in favor of the petition.

The Electric Club of Brooklyn, an organization of electrical contractors and builders, which forwarded to the Commission a resolution setting forth certain difficulties it had experienced in dealing with the Brooklyn Edison Company, and that the people of Brooklyn were entitled to and should enjoy a reasonable electric range rate. Also that in the judgment of this organization, the acquirement of the stock of the Brooklyn Edison Company by the Consolidated Gas Company will be inimical to the granting of an electric range rate at an early date, or at any date, while a combination of these companies exists. This resolution was spread in full upon the record. (Pages 25, 26, and 27 Min.) This organization has furnished no brief in the case.

Messrs. Peters & Peters, represented by Mr. E. F. Jeffe, appeared as the representative of over a thousand wholesale and commercial customers of the Brooklyn Edison Company and expressed its support of the petition. No brief has been filed by this firm.

The Public Committee on Power in the state of New York, represented by Mr. Morris L. Ernst as counsel, has filed a general and supplemental brief. The Commission has considered these documents with the following result. The following eleven points are quoted from the brief filed by Mr. Ernst:
P.U.R.1928E.

Point I

This case concerns one of the most important applications ever presented to the Public Service Commission in this state and must, therefore, be viewed with full appreciation of its broad social significance.

The brief concedes that the mere size of the merging entities should not be deemed a deterrent to the Commission's approval but that such approval should only be given if it is found that the proposal is a move for the benefit of the public and that the inhabitants of the territory affected are assured definite and substantial benefits. We believe that such substantial benefits have been shown and that they justify the approval of the petition.

Point II

The prime duty of the Commission is to protect the public, and to safeguard the consumers of the necessities of life—to wit—light, heat, and power.

The brief urges the rights and interests of consumers as opposed to those of the stockholders while admitting that "there is a duty on the Commission to safeguard the interests of the stockholders." We think it is manifest that the advantages of this proposal to consumers are clearly discernible and certainly the weight of the testimony bears heavily in that direction. Taking the interests of stockholders on one side and consumers on the other, we are satisfied that the consumers will be the largest beneficiaries.

Point III

[2] The duty of the Commission is to reject the application unless it is affirmatively in the public interest of the consumers.

This has been the attitude of the Commission, although a recent judicial decision in the Maryland case cited in the brief was to the effect that the application should not be denied unless it was *against* the public interest. Without respect to this however, this Commission makes the public interest the test in every case, and there is nothing inconsistent in the cases cited in the P.U.R.1928E.

brief under this point with the Commission's determination in this case and an approval of the present petition.

Point IV

[3] The merger should be denied unless adequate equivalents for the elimination of competition can be permanently written into the plan.

The petition is here opposed on the ground that it will destroy such competition as now exists because of the business practices of Consolidated group and the Brooklyn Edison Company. There is not, nor can there be, any actual competition. Further, the very purpose of the Public Service Commission Law is to substitute regulation for competition. Nor are the dangers of lax management foreseen by the author of the brief, of a real or potent character. The experience of the past in respect to the petitioner is sufficient ground for the rejection of this idea. Regulation has in the past, and will in the future, protect the people from the inertia of a monopoly and the evils of competition.

Point V

[4] The lighting rates of greater New York are out of line with the average rates of the country and the proposed merger must be examined with that fact in mind.

It may be stated as a fact that the lighting rates of one city cannot be determined per se by a comparison with the rates of other cities. That idea has been so often introduced in rate cases, only to be rejected, that it does not justify discussion. It is useless to make comparisons unless all the elements that enter into the problem are of a comparable nature. Local ordinances, topography, prices of supplies, labor rates, are all facts that affect costs, and unless the costs of doing business are the same, comparisons are futile. Time and again this same argument has been used in regard to New York city's gas rates with results that should afford no encouragement to its protagonists.

Point VI

[5] The merged company will so dominate the state of New
P.U.R.1928E.

York in this field of power that the Commission should well guard against those inherent vices of monopoly which continue to thrive despite control by Commission.

The gist of this point is in the last paragraph of the discussion under this head. It says:

"But above all, such complete domination of this market and such overwhelming concentration of the resources of this entire state deserve close scrutiny if we are at all concerned with the greatest public problem of our times—the use of the state's water power."

The answer is, that the question of "the use of the state's water power" is not concerned in this petition. The brief maintains that a combination of the Consolidated Gas Company of New York and the Brooklyn Edison Company will represent a control of 37 per cent of all the utility power in the state, and 49 per cent of all the utility power from steam plants, but it neglects to say that this control must serve 52 per cent of the population of the state.

Point VII

Before granting the application the Commission should determine the extent to which this merger may prejudice the future development of the state's water power on the St. Lawrence.

Nothing can prejudice the future development of the state's water power on the St. Lawrence but the failure of the state itself to pursue a broad and comprehensive policy towards this great problem. We are not prepared to follow the ideas set forth in the brief on this point. We say with confidence that if the power of the St. Lawrence is translated into service and the service can be rendered to the lighting companies in greater New York, at a less cost than they can produce their own power, no combination of selfish interests will prevail to prevent the purchase of that power at a lesser cost.

Point VIII

If you find that this merger is part of a combination of power development along the Northern Atlantic Coast the merger should be denied unless all of the interests of the public are P.U.R.1928E.

fully protected against the loss of sovereignty resulting therefrom.

The evidence is directly to the contrary that this proposal is part of a combination of power development along the Northern Atlantic coast, or a coalition of the interests mentioned in the brief.

Point IX

[6] The application is only defensible on the theory that the merger will result in operating savings and to the extent that there are such savings they should be computed in advance as far as possible and immediately guaranteed to the public. The company will not accept the consumer's premises in payment of bills—why should we accept its promises of reductions?

We believe that the granting of this petition will result in unquestioned savings as the testimony indicates and it will be the duty of the Commission to determine what these savings may be, and order reductions in rates accordingly.

Point X

[7] The increase of over \$300,000,000 in the market value of the securities involved in this merger convert this application into a rate case of the most glaring and patent sort.

This is not a rate case and it cannot be transformed into one simply by the use of assertive language as is here attempted. The Commission has no control over market quotations and is in no way responsible for them. The idea that the stocks of these companies have risen to very high figures because rates are excessive, as the brief alleges, is disproved by the fact that the Brooklyn Edison Company stock has been at its highest after two successive reductions in rates. Rates are not based upon the amount of the stock issued by a corporation. But under the law solely upon a reasonable return upon the value of the property of the company used or useful in the public service.

Point XI

Until the Commission has examined into the reasonableness of the basis of the exchange of securities as outlined in the application, and the extent to which such capitalization has a pos-

P.U.R.1928E.

sible bearing on present and future rates, the application must be denied.

We have examined, and with the greatest care, into the reasonableness of the basis of exchange of securities set forth in this petition and we are satisfied it has no bearing on future rates.

The city of New York in its brief has raised four questions.

I.

The propriety of the purchase price set upon the Brooklyn Edison stock.

II.

Advantages to the public to be realized through consolidation.

III.

Possible disadvantages to the public.

IV.

Reduction in rates as a part of the consolidation program.

We do not think it necessary to comment upon questions I, II, and III, as they are covered in other portions of this memorandum.

[8] With respect to number IV, it is urged by the city that as a precedent to or part of the approval of this petition, there should be a reduction in rates from 7 cents to 5 cents of the Brooklyn Edison Company, and in behalf of this demand the city cites certain figures, being principally comparisons of different items of the balance sheets of the Brooklyn Edison Company as of December 31, 1927 and June 30, 1928.

Attention should be called to the fact that in the first paragraph on page 19 of the city's brief it is stated that the company's miscellaneous reserve has been increased from \$1,455,706 to \$2,212,518, or an increase of \$756,812. The increase in the miscellaneous reserve was \$91,126, instead of \$756,812.

It is rarely advisable to form an opinion of an utility's financial condition or possibilities on the results of a period less than one year. In this particular case the city seeks to establish its demand for a reduction in rates on the basis of the results of P.U.R.1928E.

a half year. We must call the city's attention to the fact that in the first half of the year an electrical utility in New York city does its most profitable share of a year's business. Consequently, unless there be given due consideration to the results for the last half of the year, which are never as satisfactory, the effects of estimates or calculations are very apt to be distorted.

The engineers of the Commission have made an estimate based upon the business of the entire year 1927, if the general consumers rate had been 5 cents per kilowatt hour (rate demanded by the city) instead of 7 cents per kilowatt hour (the existing rate). This estimate shows there would have been a decrease in revenue for the year 1927 of \$6,500,000. Examination of the annual report of the Brooklyn Edison Company for the year 1927 shows that it increased its reserves during that period to the amount of \$4,215,000.

Is it necessary to do anything more than call attention to that fact in order to show that any such reduction as the city suggests would have had the effect of suspending all accruals for reserves, but also would have made it necessary to draw upon reserves which accumulated in the past, and to reduce the dividend which the company has been paying? It should also be considered that any ex parte reduction in the rate as called for by the city would not be done without discrimination against the consumers of power whose interests as consumers must, under the spirit of the Public Service Commission Law, be given the same consideration as the interests of all other consumers.

It is manifest that the calculations submitted by the city offer no justification for such an immediate reduction as it demands.

The city has requested that there be incorporated in any order issued in this case a provision to the effect that its participation in the hearings in this proceeding shall in no wise affect an appeal now pending in the appellate division of the supreme court for the first department, and which involves the franchises underlying the use by the Brooklyn Edison Company of the streets and highways of the borough of Brooklyn, nor shall its participation in this proceeding and the approval of the petition herein tend to affect or validate the franchises of the Brooklyn Edison Company to use the streets and highways in the borough of P.U.R.1928E.

Brooklyn, nor estop the city of New York from pursuing its appeal to final determination. A provision of this character will be inserted in the order to be entered upon this decision.

As before stated, the Consolidated Gas Company proposes to acquire the 900,000 shares of the outstanding common stock of the Brooklyn Edison Company by giving in exchange for each share acquired two shares of its new common stock and one share of its \$5 cumulative preferred stock, both without par value. This proposed exchange was approved by the stockholders of the Consolidated Company at a special meeting called for that purpose, and at the same meeting the stockholders of the company authorized the increase of its common stock from 4,320,000 shares to 12,000,000 shares and directed that all previously authorized and outstanding shares of common stock be changed into twice the number of shares of the same class by issuing to each holder of common stock one additional share for each share registered in his name so that the two shares of common stock, without par value, proposed to be given on this exchange, are equivalent to one share of common stock of the company now outstanding.

[9] In support of the basis of this exchange the company introduced three exhibits:

Exhibit No. 3 is a comparison of values on the basis of weekly exchange quotations for the months of May and June, and up to the 7th day of July, 1928. This exhibit shows the high and low quotations of Consolidated Company's common and preferred stocks and Brooklyn Edison stock, and concludes with a computed average on July 7th of $253\frac{1}{16}$ for the combined Consolidated stocks as against $249\frac{1}{4}$ for Brooklyn Edison stock.

Exhibit No. 4 is a comparison between the combined values of one share each of no par common and preferred stock of the Consolidated Company and one share of Brooklyn Edison Company stock based upon the average rates realized per share from sales of Consolidated Company stock as authorized by the Public Service Commission, and upon earnings for the year 1927. The outstanding capital stock of the Consolidated Company consists of 4,320,000 shares of no par value common stock and 1,200,000 shares of \$5 preferred stock, of which 2,000,000 shares

P.U.R.1928E.

of common stock were issued and outstanding prior to the enactment of the Public Service Commission Law. The Consolidated Company realized from sales of its common stock authorized by the Commission, \$57.84 per share and for its preferred stock \$91 per share, or a total of \$148.84 for one share each of common and preferred. The earnings of the company for 1927 were \$11.37 per share which is equivalent to a return of 7.64 per cent on \$148.84. The earnings of the Brooklyn Edison Company for the same year were \$11.15 per share, which is equivalent to a 7.64 per cent on \$145.94.

Exhibit No. 5 is a computation based upon 1927 earnings of the Brooklyn Edison Company, assuming that company to have a capital structure comparable with that of the Consolidated Company. The surplus earnings of the Consolidated Company for 1927 were equivalent to 4.59 times its preferred dividend requirements. Upon this basis, the surplus earnings of the Brooklyn Edison Company, at the same ratio, would support 437,315 shares of \$5 preferred stock and 1,230,955 shares of common stock of no par value, and if this were the capital structure of the Brooklyn Edison Company, each stockholder would be entitled for each share of his present stock .486 share of preferred stock and 1.334 of common stock, which at market quotations for Consolidated stock, on July 7th, would amount to \$252.06 as compared with market quotation for Brooklyn Edison stock on the same day of \$248. The combined average market quotation on Consolidated common and preferred stock on that day was \$253.31.

Whatever may be said as to the fairness of the foregoing comparisons or tests of value as a basis for the exchange of stocks as between stockholders of the respective companies, we are of the opinion that such tests afford no adequate basis for arriving at the value of the stocks in question or of the assets represented by such stocks.

These exhibits are founded, to a greater or less extent, on stock exchange quotations of various dates, which tend merely to show what value the investing public puts upon this stock. Market value is, of course, based upon various considerations, including stability, cost of money, rate of return, and hope of P.U.R.1928E.

future enhancement, but does not necessarily reflect investment costs.

[10] Under the law a gas or electrical corporation may issue its capital stock only when necessary for the acquisition of property, the construction or improvement of its system, etc. In this case the property proposed to be acquired is the capital stock of another utility, and is not physical property to be used in operation. The intent of the law, however, is to restrict securities that may be issued by utilities to actual investment in property, and where the capital stock of one utility is purchased by another utility corporation, as in this case, we are of the opinion that any securities issued by the purchasing corporation should be substantially on the same basis that controlled the issue of securities sought to be acquired, and upon this application we have decided to limit capital expenditures of the Consolidated Company to the book value of the shares of capital stock of the Brooklyn Edison Company it may acquire.

The order to be entered upon this decision will provide that nothing in this decision or in said order will be offered or received in evidence in any proceeding, action or matter hereafter involving the value of the assets of the corporations involved in this proceeding, or the rates, charges or service of said corporations, or either of them, or their successors.

Chairman Prendergast, Commissioner Pooley and Commissioner Van Namee concurring, Commissioner Van Namee with memorandum; Commissioner Lunn concurring in the result, with memorandum.

Van Namee, Commissioner: I was present at both hearings in this case where Mr. Morris L. Ernst, attorney for the Public Committee on Power in New York state, argued at length in relation to his right to participate in the proceedings. His statements and comments occupy 14 per cent of the entire record. He was not curtailed or hindered in his argument and was permitted to ask questions of several of the witnesses and to address inquiries to the Commission which were transmitted by the sitting Commissioner to the witnesses. I concurred with Chairman Prendergast and Commissioner Pooley in the ruling made at P.U.R.1928E.

the first hearing that the Public Committee on Power in New York state was not a proper party to the proceeding and was not entitled to present witnesses, nor to examine or cross-examine the witnesses presented by the applicants.

At the first hearing, a brief consisting of 54 printed pages was offered by Mr. Ernst and later received in the case. Mr. Ernst was told that the Commission would consider the statements made therein in its decision of the case.

At the second hearing, July 25th, I concurred with Chairman Prendergast in sustaining our ruling at the first hearing. We again allowed Mr. Ernst to argue his views at length. Later, Mr. Ernst filed a supplementary brief consisting of six type-written pages which was received and has been made a part of the proceedings. I have never felt that the Public Committee on Power was a proper party to this proceeding. Though sincerely believing in the fullest public discussion of matters of this kind, or indeed any questions before the Commission, I realize that certain rules must be adhered to and that the term "public hearing" does not mean that all persons, whether or not they have anything germane to offer, are entitled to be heard at length in a proceeding.

The hearings before the Public Service Commission are of a quasijudicial nature and legal rights are involved. In this respect they differ wholly from hearings before legislative committees or hearings on legislative bills before the Governor of the state. I believed at the close of the second hearing that Mr. Ernst had been allowed to present his case at great length and that with the filing of the original brief of 54 pages and the supplemental brief of six pages he had been given all the hearing to which he was entitled.

[11] Subsequently, Governor Smith telegraphed to the Commission requesting that "individuals or organizations be given an opportunity to be heard for or against the question of merging electric light and gas companies now pending before your Commission." Though holding the views I have already expressed as to the completeness and reasonableness of the hearing already accorded to Mr. Ernst, I felt that I should defer to the Governor's request. I, therefore, prepared and offered a resolution
P.U.R.192SE.

to reopen the case. In this resolution I moved "that the hearings in this matter be reopened in order that any person or persons who felt that they have further information relating to this matter be heard." This is quite distinct from reopening the case and allowing Mr. Ernst's client to appear as a party in interest. The vote on my resolution was a tie. The only way this tie can be broken is for Commissioner Brewster, the fifth member of the Commission to appear and take part in the proceedings. Commissioner Brewster at the present time is suffering from a serious injury to his eye and is confined to his bed in Syracuse. There is no prospect of his being able to sit in a hearing or consider these matters and write opinions before the middle of September. For this reason, consideration of this matter with him cannot be had before the early part of October. The owners of over 800,000 shares of stock of the Brooklyn Edison Company, having a market value today of over \$200,000,000, have deposited their stock with certain trustees pending the action of the Commission in this matter. This places the owners of such stock in a position where they are, to an extent, deprived of that freedom of action they might desire to exercise. To suspend such an important matter and to reach no decision for a period of two or three months, seems to me an unfair and unjust position to take, especially as the public is being prevented from enjoying the advantages which should come from this proposal. The result of the tie vote on the motion to allow Mr. Ernst to argue before the Commission is that the hearings are closed and the only action possible is to proceed to a disposition of the application.

I have carefully examined the briefs submitted by Mr. Ernst and the city of New York, the latter appearing in the case as a party in interest, and having the privilege of examining the witnesses presented by the applicant and of presenting its own witnesses, and I can find in them no sufficient reason for a denial of the application. The reasons for this conclusion are set forth in full in the memorandum of the Commission. In my heart and conscience, I believe that the granting of this application will be of great benefit to the people of the city of New P.U.R.1928E.

York and that almost immediately its beneficial results will be apparent.

Feeling as I do, I believe it is my duty to vote for the granting of the application and I, therefore, concur in the memorandum of the Commission submitted herewith.

Lunn, Commissioner: The record reveals that the public committee on power of the state of New York, represented by Mr. Morris Ernst, was not allowed to be heard in opposition. Surely it is destructive of the very processes of utility regulation when the right of the public to be heard is not sacredly safeguarded. In the instant case this was not done. Furthermore, the Commission on July 31st by a tie vote refused to reopen the case at the request of the Governor of the state, whose only recommendation was that any person or organization desiring to be heard for or against petitioner should have the opportunity. Denial of the right to be heard is a blow at the very foundation of public utility regulation, and I must register my unqualified protest against the decision of the majority of my colleagues taken at the hearing July 18th; also by protest against the action of Chairman Prendergast in rendering a decision at the hearing July 25th with only a minority present.

To deny any citizen, however great he may be or however humble, the right to be heard for or against any proceeding before the Commission, is completely to nullify the purpose for which the Public Service Commission was established. In order that the scope of its activities might not be circumvented by technicalities, the Commission law provides that at any hearing the Commissioners are not bound by the technical rules of evidence. The purpose of this provision is that the fullest and completest possible hearing on any given case might be had and that the Commission might be free to receive testimony, even though at times there might be a question as to its materiality. If the law is not sufficiently clear at present it should be amended so that no Commissioner or majority of a Commission would have it in their power to refuse any interested citizen the right to be heard. To guarantee the right of the public to be heard
P.U.R.109SE.

is not only in the public interest, but it is in the interest of every public utility.

The instant proceeding has been closed. I have tried to persuade my colleagues to reopen the case; they refuse to reopen. I could register my protest by a vote of disapproval of the petition, but that would in my opinion be unjust both to stockholders of these two companies and the two million consumers, and for no purpose except to give evidence of sincere disagreement with the method pursued by my fellow members of the Commission.

A careful study of the case and the reading of the briefs filed by the contestants, convinces me that the facts clearly reveal that approval of the petition is decidedly in the public interest. Lower rates to consumers can and will be obtained by this consolidation. It is in the public interest that the petition be approved and for that reason I concur.

INDIANA PUBLIC SERVICE COMMISSION.

RE PETERSBURG WATER COMPANY.

[No. 9384.]

Security issues — Municipal plant — Dummy corporation.

An application by a water company controlled by a municipal corporation to issue bonds as a private corporation was refused approval in view of the probability of the validity of such bonds being questioned.

[August 8, 1928.]

APPLICATION of a water company controlled and owned by a town to issue securities; application denied.

Appearances: S. M. Krieg, Ely & Corn, Merle N. A. Walker, for the petitioner; Carl M. Gray, for respondents.

Ellis, Commissioner: On May 25, 1928, the Petersburg Water Company filed with the Public Service Commission of Indiana its petition for authority to issue \$85,000 in bonds. Said petition, omitting caption and signatures, is as follows:

"The undersigned, the Petersburg Waterworks Company of P.U.B. 1928E,

Petersburg, Indiana, a corporation, authorized by its articles of incorporation to operate a public utility, to-wit:—a waterworks plant and system in the town of Petersburg, Indiana, hereby petitions your honorable body to permit it to cause to be issued \$85,000 in first mortgage bonds of such corporation payable in twenty years bearing interest at the rate of not to exceed five per cent per annum, payable semi-annually, secured by a first mortgage upon the real and personal assets of the corporation including the income from all leases, rentals, and service charges after deducting expenses of operating such corporation and subject further to the terms and conditions of such first mortgage.

“That in support of such application and petition your petitioner represents and shows that it was incorporated under the laws of the state of Indiana on the 30th day of March, 1901, with a capital stock consisting of 100 shares of common stock of the par value of \$100 each: that at the time of its incorporation it caused to be issued such stock and that all of such stock is fully paid up and for the purpose of constructing the original plant said corporation caused to be issued its bonds in the amount of \$36,000.

“That all of such bonds except \$5,000 have been fully paid by this applicant.

“That additional improvements have been made out of income during the period of the last twenty-seven years largely increasing the assets of said corporation.

“That in 1927 the town of Petersburg had a population of approximately thirty-three hundred inhabitants.

“That its present water supply is entirely inadequate to supply said population and to furnish adequate fire protection to the city of Petersburg and its inhabitants.

“That this petitioner has caused a survey to be made by competent engineers, Jeup & Moore of the city of Indianapolis, and that such appraisers and consulting engineers have fixed the estimated value of the present plant and water system owned by this applicant at the sum of \$115,549; that said sum is the fair value and the reasonable estimated value of the property now owned by the applicant all of which has been fully paid for except the aforesaid balance due on the first issue of bonds of P.U.R.192SE.

\$5,000 which is due and payable serially in 1928, 1929, and 1930.

"That in order to provide the additional equipment filtration, reservoirs, power plants, pumping equipment, treatment equipment required to produce an adequate water supply for said city to meet the approval of the State Board of Health it will be necessary to borrow the sum of \$85,000, evidence such loan by the issuance of \$85,000 of first mortgage bonds of this applicant payable in the following maturities:

"Two thousand dollars for each year for the years 1929 to 1949, inclusive, and \$45,000 of such bonds in 1950.

"That said funds to be produced from the sale of such securities shall be used exclusively for the redemption.

"First, for the redemption of the outstanding bonds of \$5,000.

"Second, for the payment of the cost of construction of the new plant at the estimated cost of construction of \$75,000 including \$5,000 for engineering expense and supervision.

"That the applicant further represents in support of this petition that the said securities are to be sold for cash and applied exclusively to the betterments and new construction and the redemption of outstanding bonds as hereinbefore set out.

"That in order to produce funds sufficient to redeem and pay the interest and bonds according to the terms, should the same be authorized by the Public Service Commission, it is proposed that the corporation and applicant shall enter into a lease contract with the city of Petersburg by which the entire plant owned by this applicant as improved and completed by the investment of the proceeds of this issuance of bonds shall be leased to such city at and for the fixed net rental of \$7,000, which is a sum sufficient to pay the interest on said issue of bonds together with the annual redemptions as they mature.

"Said lease shall further provide that the city shall operate the plant at its own expense.

"The applicant further states in support of his petition that this plant has been in continuous operation since its incorporation and that as a part of this petition it now presents a statement of the present assets and liabilities which is for the purpose of convenience marked Exhibit "A."

"That it presents further a detailed statement of the proposed improvements to be installed and paid for from this bond issue illustrating in substantial detail the equipment and improvements proposed which are more particularly set out and attached hereto and identified as Exhibit "B."

"That for the further information of your Commission the applicant represents that the present approximate water consumption of the city of Petersburg is approximately 150,000,000 gallons per annum and that by the proposed improvement an adequate supply of pure water will be furnished to such inhabitants.

"That an order has been heretofore issued by the secretary of the State Board of Health requiring the city of Petersburg to promptly take such steps as are necessary to produce for the inhabitants of said city an adequate, portable supply of water.

"Wherefore, your petition prays the Public Service Commission for authority to cause to be issued not to exceed \$85,000 of 5 per cent first mortgage bonds of the applicant maturing and redeemable as set forth in the petition at a rate of interest not to exceed 5 per cent and for other proper instructions herein.

Petersburg Water Company
By Geo. W. Deffendall (Signed)
Its President.

Attest:

Granville V. James (Signed)
Its Secretary
State of Indiana } ss.
County of Marion } ss.

Personally appeared before me a Notary Public, George W. Deffendall, the president of the Petersburg Water Company, and Granville V. James, as secretary and treasurer of said company, who being duly sworn on oath says that the matters and things set forth in the foregoing petition for authority to issue bonds is true and that he makes this affidavit for and on behalf of the petitioner the Petersburg Water Company.

Geo. W. Deffendall
Granville V. James

P.U.R.192SE.

Subscribed and sworn to before me this 14th day of May, 1928.

Frank C. Graninger (Signed)
Notary Public

My commission expires

June 15, 1929"

This matter was set for hearing at the Petersburg Court House, July 17, 1928, and legal notice of the time and place of said hearing was given by the Commission.

There was evidence submitted at the hearing concerning all the matters involved in this cause, but the Commission in this order will discuss the evidence and call attention to the facts in connection with the position of the respondents, that the Petersburg water plant is, in fact and in law, a municipal plant and not the property of the Petersburg Water Company, a private corporation.

The evidence shows that the Petersburg Water Company was incorporated in 1901 and that the town of Petersburg became the owner of all the common stock of said company. The company issued certain bonds, nearly all of which have been retired at this time. It is further shown that over the period of years between 1901 and 1928 there has been very little, if any, activity on the part of the Petersburg Water Company; that its powers and duties became intermingled with those of the town of Petersburg and were taken over by the town of Petersburg.

For example, the funds belonging to the water plant were carried by the treasurer of the town of Petersburg upon the books of the town of Petersburg as a water fund and only this year have said funds been transferred to a separate account in a bank in the name of the Petersburg Water Company. It is further shown that the Petersburg Water Company has not filed annual reports with the secretary of state as required by law.

In 1928, faced with the necessity of making repairs to the property and installing a purification plant on account of an order of the State Board of Health, it is shown that the officials of the town of Petersburg have sought to revive as a private corporation the Petersburg Water Company for the purpose of P.U.R.192SE.

issuing bonds to cover the proposed expenditures in connection with the improvement of the plant.

In this connection the Commission will call attention to the following facts:

1. In 1907 the town of Petersburg applied to the Pike circuit court for an order restraining the county treasurer from collecting taxes upon the real estate of the Petersburg Water Company. In its complaint, the town of Petersburg made the following allegations: "That said real estate has been wrongfully and unlawfully assessed and placed upon the tax duplicate of said county during the years 1905 and 1906. That taxes to the amount of \$_____ are now charged, levied, and assessed against said real estate and remain and are upon the tax duplicate of said county in the hands of said treasurer and said auditor. That said real estate is assessed and appears on said duplicate in the name of the Petersburg Water Company, but that the plaintiff is the owner of and is in full possession and control of said real estate, and is the owner of and in full possession and control of all the property, both real and personal, of the Petersburg Water Company."

The court, after having heard the evidence, entered the following decree in this case: "It is, therefore, considered and adjudged by the court that the plaintiff is the owner of the above described real estate and that said real estate is exempt from taxation, and that the assessment now appearing upon the tax duplicate of said county is hereby cancelled and held for nought, and taxes to the amount of \$219.31 is cancelled, and the treasurer of said county is hereby perpetually enjoined from collecting the same, and the Board of Commissioners of said county and said auditor are hereby ordered and authorized to settle with said treasurer in conformity with this decree, and the title of the plaintiff in and to said real estate is hereby quieted and the lien for said taxes declared null and void and of no force and effect whatever, and the auditor and treasurer of said county are hereby perpetually enjoined and restrained from placing said real estate upon the tax duplicates of said county and from levying and assessing any taxes whatever against said real estate, all of which P.U.R.1928E.

is considered and adjudged by the court as against all of the defendants at the cost of the plaintiff."

2. On August 15, 1921, the board of trustees of the town of Petersburg filed with the Public Service Commission a petition in Cause No. 6167, asking for authority to issue \$7,500 of the bonds of the Petersburg Water Company. After hearing, the Commission, on December 8, 1921, entered its order in this cause, authorizing the Petersburg Water Company to issue \$7,500 of its bonds for the purpose of making extensions and betterments to its water plant and system.

On November 21, 1921, the town of Petersburg filed with the Commission its petition to modify the order entered in Cause No. 6167, said petition is as follows:

"State of Indiana

"Public Service Commission of Indiana

"In the Matter of the Petition of
the Town of Petersburg for } No. 6167
Authority to Issue \$7,500 of Bonds. }

Approved September 8, 1921.

"Petition to Modify Order.

"The petitioner, the town of Petersburg, respectfully requests the Commission to modify its order of September 8, 1921, in the following particulars and for the following reasons, to-wit:

"That said order be modified to read as follows:

"The clause in said order beginning, 'It is apparent, therefore, etc.' and in the paragraphs following, be modified to read as follows:

"It is apparent, therefore, that the town of Petersburg is the owner of the water works system and the Commission will consider the bonds issued to improve the same as the bonds of the town of Petersburg.

"The Commission being fully advised is of the opinion and so finds that the improvements and extensions are reasonable and necessary, and that the amounts required for such improvement and extensions are reasonable, and that the town of Peters-P.U.R.1928E.

burg should be authorized to issue and sell \$7,500 of its 6 per cent bonds, as prayed.

"And it is, therefore, ordered by the Public Service Commission of the state of Indiana, that the town of Petersburg be, and it is authorized to issue and sell not less than par \$7,500 par value of its 6 per cent bonds in denominations of \$500 each, maturing as desired, the proceeds on the sale of which are to be used for the purpose of making extensions and betterments to its water plant and system as above set out, and for no other purpose.

"And that said order as modified be made retroactive and effective as of September 8, 1921.

"That the town of Petersburg is the owner of the Petersburg Water Company, and the water works system, and that in law the Petersburg Water Company is merely a 'dummy' corporation.

"That the facts presented at the hearing and set out in the order, show that the town of Petersburg is the owner of its water works system and that the authorization should be that the town of Petersburg issue its bonds for the betterment of said plant.

"Wherefore the petitioner prays that the order of the Commission of September 8, 1921, be modified as above set forth and that said order be retroactive and effective as of said date, and for this we will ever pray.

"Respectfully submitted,

"THE TOWN OF PETERSBURG

"BY RUFUS CALVIN (Signed)

"President

"Subscribed and sworn to before me this 19th day of November, 1921.

"W. D. CURLL, (Signed)

"Notary Public

"My commission expires December 23, 1922."

Accompanying the petition for modification of the order was a letter from William D. Curll, attorney, who represented the P.U.R.1928E.

town of Petersburg in the proceedings. The Commission, taking judicial notice of its own records, will call attention to this letter now in the files of the Commission, as follows:

"In Re your order No. 6167 of September 8, 1921. On petition of the town of Petersburg for authority to issue \$7,500 of Bonds.

"I am herewith enclosing a petition in duplicate for a modification of your order of said date. It is clear under the law that the town of Petersburg is the owner of the water works system, as you will find from an examination of the case of the Eddy Valve Co. v. Crown Point, 166 Ind. 613, 76 N. E. 536. The plant at Crown Point was constructed and taken over by Crown Point under the same conditions as the plant at Petersburg was secured. This case holds that the mortgage indebtedness assumed by Crown Point is a debt of the town.

"Therefore, since the town is the owner of the plant and the mortgage debt against the property of the company, at least an indirect debt of the town, the town should be authorized to issue its bonds for the improvement of the system. The name, the Petersburg Water Company is merely carried along by the town for the purpose of keeping the funds from the sale of the water separate from its other funds. It is impossible for the town to negotiate and sell the bonds of the water company for the reason that it has no officers. It would be unreasonable to believe that under the circumstances the town will not pay off the encumbrance and thus allow the mortgage to be foreclosed and the property sold thereunder, thereby depriving the town and its inhabitants of the use and benefit of the water plant.

"Therefore, since it is the property of the town, the town should be authorized to raise funds to improve its property.

"I felt at the time the order was made that the Commission was in error in not authorizing the town to issue the bonds, and the attorneys who examined the transcript, have refused to approve the issue, unless the bonds are made the direct obligation of the town, as in law they should be.

P.U.R.1928E.

"Therefore, I trust the Commission will not hesitate to make the modification proposed in the petition.

"Very truly yours,

"W. D. CURLL (Signed)

WDC/IC

"Town Attorney.

"P. S. May we ask the Commission to act on this petition as soon as possible.

"Very truly yours,

"W. D. C."

Following the filing of the petition for modification of the original order in Cause No. 6167, the Commission in supplemental order approved December 2, 1921, modified said original order so as to authorize the town of Petersburg to issue \$7,500 of bonds instead of the Petersburg Water Company.

3. Under the law all public utilities are required to file annual reports with the Public Service Commission of Indiana. On February 25, 1928, a report of the "city of Petersburg" for a Class C water utility covering the year ended December 31, 1927, was filed with the Commission. This report is signed and attested by George W. Deffendall, Mayor, and Granville V. James, Clerk-Treasurer. On page 2 of said report, line 1 is the following: Private or municipal—*Municipal*. (The word underscored was filled in a blank space in the report by the officers of the town of Petersburg preparing the same.)

Page 2, lines 29, 30, 31, and 32 are as follows:

"List of Officers

Official Title	Name	P. O. Address
29 President	None	
30 Vice-President	"	
31 Secretary	"	
32 Treasurer	Granville V. James	Petersburg, Indiana."

The Commission calls attention to the fact that the record in the cause shows that Granville V. James is the clerk-treasurer of the town of Petersburg.

The Commission is of the opinion that the town of Petersburg is bound by its own acts in regard to this water company. The town went to the courts alleging that the real estate and all the P.U.R.1928E.

property of the water plant belonged to the town and the court so held in regard to the real estate, exempting it from taxation. The town petitioned the Public Service Commission to modify an order authorizing the Petersburg Water Company to issue bonds so as to make such bonds the obligation of the town of Petersburg, and the Commission so modified the order. The town, in making annual reports to this Commission, declares that the water plant is in fact a municipal plant.

There seems to be no dispute and the Commission is of the opinion that some steps must be taken to provide improvements at the water plant in Petersburg in order to meet the requirements of the State Board of Health.

This Commission desires to do all in its power to bring about the installation of necessary improvements at the earliest possible date. In view of the evidence in this cause and in view of all of the facts before this Commission, it can not, however, authorize the issuance of bonds by the Petersburg Water Company as a private corporation for this purpose. It is the opinion of the Commission that any such authorization would immediately be followed by the raising of question concerning the legality of such bonds as was done in 1921.

This Commission will permit the filing of an amended petition in this cause or such other action as the proper officials may determine upon after consideration of the order made at this time. In view of the findings made above, the Commission does not deem it necessary to discuss any other phases of this case.

Singleton, McCardle, Harmon, McIntosh, Commissioners, concur.

UTAH PUBLIC UTILITIES COMMISSION.

LOGAN CITY

v.

UTAH POWER & LIGHT COMPANY

[Case No. 984.]

Monopoly and competition — Rate cutting — Competitive municipal plant.

An electric utility was given permission to reduce its rates as low P.U.R.1928E.

as those charged by a municipal utility operating in the same city in order to cope with competitive rate cutting by the latter, pending a determination and a motion for rehearing by the supreme court of the state of a decision holding that the Commission had no authority to regulate the rates of a municipal plant.

[August 4, 1928.]

PETITION by private electric utility for authority to reduce rates; granted.

Appearance: George R. Corey, Attorney, of Salt Lake City, Utah, for Utah Power & Light Company.

Supplemental Report and Order.

By the Commission: On the 30th day of July, 1928, the Utah Power & Light Company, the defendant in the above-entitled matter, filed herein its petition for modification of the Commission's order made and entered on the 23rd day of December, 1927, P.U.R.1928B, 410, requiring the defendant to serve its customers using electrical energy in Logan City, Utah, at the rates prescribed in said order.

The matter came on regularly for hearing before the Commission, after due notice given, at its office in Salt Lake City, Utah, August 3, 1928. Logan City entered its appearance with respect to the petition applied for by the Utah Power & Light Company and stated that Logan City had no objection to the application nor to the granting of the temporary order sought for by the defendant.

It appearing that on the 23rd day of December, 1927, *supra*, the Commission ordered that on and after the 1st day of March, 1928, both the complainant, Logan City, a municipal corporation, and the defendant, the Utah Power & Light Company, a corporation, should proceed to serve their respective patrons at Logan City with electrical energy at certain rates set forth and prescribed in said order; and that thereafter Logan City filed with the supreme court of Utah its application for a writ to review the Commission's order, and that on January 29, 1928, the supreme court issued a writ of certiorari to the Commission; that thereafter, on the 27th day of June, 1928, the said court entered its decision in said case, holding, "that the order of the Commis-P.U.R.1928E.

sion is annulled and vacated in so far as it fixed the rate or charge required to be made and charged by Logan City and set aside the contracts entered into by it with its customers and consumers of electrical energy," that thereafter, within the time allowed by the law, and the rules of the court, to-wit: on the 12th day of July, 1928, the defendant, Utah Power & Light Company, filed with the clerk of the supreme court its application for a rehearing, which said application is still pending and undecided by said court.

And it further appearing that the complainant, Logan City, is now charging and will continue to charge for electrical service rendered its patrons and consumers within Logan City, rates other and lower than those prescribed by the order of this Commission, and is soliciting business from the consumers of the defendant, Utah Power & Light Company, at other and lower rates than prescribed in the order of the Commission, to the injury and damage of the defendant, Utah Power & Light Company, and that said Logan City proposes to continue said rates other than those prescribed by the Public Utilities Commission, notwithstanding said application for rehearing before the said court has not been heard nor disposed of, the result of which would be that the defendant, Utah Power & Light Company, would be deprived of patronage unless permitted to serve at the same rates as are now being accorded electrical consumers in Logan City by Logan City.

Now, therefore, by reason of the premises, it is hereby *ordered*, that, pending the final decision of the supreme court of the state of Utah on said application for rehearing, the Utah Power & Light Company be, and it is hereby, permitted to serve its customers taking electrical service in Logan City at the same rates as are now or may be charged by Logan City to its customers using electrical energy.

Ordered further, that this order shall be effective as of July 1, 1928, and only until the supreme court shall have determined the matters involved in said application for rehearing.

P.U.R.1928E.

COLORADO PUBLIC UTILITIES COMMISSION.**RE WILLIAM CRAIG.**

[Application No. 1019, Decision No. 1852.]

Monopoly and competition — Promise of improved service.

1. The Commission will not refuse to authorize additional service over a route inadequately served because of the mere probability and promise of the existing operator to purchase adequate facilities in the future, especially where ample opportunity has been afforded in the past and he has not done so, p. 61.

Monopoly and competition — Fundamental inadequacy of service.

2. A certificate will be granted authorizing additional service where the inadequacy and unsatisfactory nature of existing service is of a fundamental nature, p. 62.

Service — Automobiles — Passenger cars for large shipments.

3. The use of passenger cars for large shipments of flour and other freight, requiring the shipments to be broken up into small portions was held to be inadequate, and additional service by motor truck was authorized, p. 62.

Monopoly and competition — Soliciting bus patronage on railroad premises.

4. The solicitation and advertisement for passengers by a bus operator on railroad premises was held to be improper and the operator was ordered to refrain from such practices and to see that his employees did likewise, p. 62.

Monopoly and competition — Automobile companies.

5. Additional service was authorized over a route where existing service by passenger cars was inadequate to take care of hauling freight and express exceeding 25 pounds, leaving the other type of business to be carried on by the original operator, p. 63.

[July 27, 1928.]

APPLICATION of a motor utility operator for a certificate of convenience and necessity; granted with restrictions.

Appearances: Benjamin B. Russell, Durango, attorney for applicant; J. J. Downey and H. W. Murray, Cortez, attorneys for C. T. Woodin.

By the **Commission:** On December 29, 1927, William Craig filed his application for certificate of public convenience and necessity, authorizing the transportation of passengers, express, and freight between Dolores, Colorado, and McElmo, Colorado, and intermediate points. On January 14, 1928, C. T. Woodin filed P.U.R.1928E.

his written objections. The case was regularly set for hearing and was heard at the court house in Cortez, Colorado, on June 10, 1928.

The applicant has been carrying mail between Dolores and McElmo and intermediate points, including Cortez, for two years. Dolores is situated twelve miles from Cortez, and McElmo is about twenty-eight miles west of Cortez.

He proposes to use in his operation a two-ton Graham truck at the value of \$1,800 and a one-ton Ford truck at the value of \$250. He has in addition a covered spring wagon and team of horses of the value of \$350 which he is compelled to use a part of the time when the roads are impassable on account of snow or other weather conditions.

The applicant operated unlawfully for a time due to being advised that he needed no certificate. A temporary injunction was issued against his continued operation, after which he strictly obeyed the same.

[1] C. T. Woodin has a certificate for the transportation of passengers, express and freight between Dolores and Cortez. A great number of witnesses appeared and testified that the service rendered by C. T. Woodin, particularly in the transportation of freight, is unsatisfactory and inadequate. Mr. Woodin owns no truck. Most of the time he attempts to haul his freight in a 12-passenger White passenger bus which obviously does not have the capacity for a large amount of freight. He introduced in evidence an order given to a truck dealer on December 22, 1927, for a truck. He testified that the order is still in effect and that he still desires to procure the truck and that the dealer had been unable to make delivery. It is difficult for the Commission to understand why a man cannot purchase a truck, if he so desires, within a period of more than six months. Moreover he testified that he is of the opinion that he does not need a truck. From the evidence the Commission is of the opinion that Mr. Woodin is not likely in the future to take delivery of or purchase a truck. However, the Commission will not base its order on the possibility or probability of his purchase of the truck. The attorneys for Mr. Woodin attempted to show that the large volume of testimony given in support of the application and to
P.U.R.1928E.

the effect that the service being rendered by Mr. Woodin is unsatisfactory and inadequate is based on sympathy for the applicant herein.

[2] Without going into the evidence in detail, the Commission is of the opinion and so finds that the town of Cortez needs additional transportation service between Cortez and Dolores, and that the service of the certificate holder, Woodin, is unsatisfactory and inadequate. It is true the Commission has repeatedly held it would not issue an additional certificate where inadequacy of the service complained of is of a nature that might be expected to be remedied by order of the Commission or otherwise. However, where the inadequacy and unsatisfactory nature of the service is of a fundamental nature, as we find it to be in this case, we have consistently granted an additional certificate.

[3] We might say that some of the complaints against Mr. Woodin's operation are that he has no truck, as already stated; that large shipments of flour and other freight, instead of being hauled at one time as an operator would be expected to handle the business, is broken up into small shipments which are piled in a passenger bus; that he does not haul and deliver smaller shipments with promptness and dispatch; that the consignees of flour complain that the same is not delivered in Dolores in good condition and that they come personally on Sundays to get mill products because of the dissatisfaction with Woodin's service; that his drivers are not competent and that at times Mr. Woodin himself will not entrust or permit a driver to bring some shipment, such as plate glass, but postpones the transportation thereof until he himself can handle it, and that he has too many details to look after in order to handle all of the business properly.

[4] One phase of the evidence dealt with Mr. Woodin's alleged improper conduct in soliciting passengers for Durango via Cortez on the premises of the Rio Grande Southern Railroad. If this objected to by the railroad, as it evidently has been, he has no right to make any such solicitation on their property and will be expected in the future to refrain therefrom and see that his employees do likewise. He will also be expected to refrain from advertising in any manner whether on his bus or otherwise

P.U.R.1928E.

that he is carrying passengers to Durango. If passengers want to ride with him to Cortez and there take the motor bus which runs direct to Durango, it is their privilege.

[5] Mr. Woodin is equipped primarily, and apparently adequately, to handle passengers and express. The Commission does not feel at the present time authority should be given to another carrier to haul more than freight and express shipments exceeding twenty-five pounds. If the applicant herein is permitted to haul the freight and express exceeding twenty-five pounds, we believe that with a division of such business the present certificate holder, Woodin, should be able to conduct his business more efficiently than it has been conducted in the past. If he cannot remedy the situation it might be that the public convenience and necessity will later require the granting of a further certificate to the applicant herein or some other person.

After careful consideration of the evidence, the Commission is of the opinion and so finds that the public convenience and necessity requires the motor vehicle operation of the applicant herein for the transportation of freight and express weighing in excess of twenty-five pounds between Cortez and Dolores, but that it does not require the transportation at this time by the applicant for passengers and express shipments weighing less than twenty-five pounds.

There is no authorized operation by any other person than the applicant between Cortez and McElmo. The evidence shows that the public convenience and necessity requires a public carrier operation for the transportation of passengers, express, and freight between those points. The Commission is, therefore, of the opinion and so finds that the public convenience and necessity requires the motor vehicle operation of the applicant for the transportation of passengers, express, and freight between Cortez and McElmo and intermediate points, and express, regardless of weight, and freight between Dolores and McElmo and points intermediate to Cortez and McElmo.

P.U.R.1928E.

COLORADO PUBLIC UTILITIES COMMISSION.**RE G. & W. GARAGE AND TOURS COMPANY.**

[Case No. 367, Decision No. 1846.]

Fines and penalties — In lieu of suspension of certificate.

A motor operator found guilty of violating a tariff was permitted at his request to pay \$50 to the secretary of the Commission to be turned into the state treasury in lieu of the suspension of his certificate, notwithstanding a doubt whether the Commission had authority to impose a fine upon such operator.

[July 25, 1928.]

COMPLAINT against alleged illegal practices by a motor carrier; complaint sustained and proceedings dismissed upon payment of \$50 penalty.

Appearances: George J. Wetherald, Manitou, for G. & W. Garage and Tours Company; Benjamin A. Payne, Colorado Springs, for the Hammond Scenic Auto Company.

By the **Commission**: Complaint was made to this Commission against George J. Wetherald, E. E. Wetherald and Joseph Premo, Co-partners, doing business as the G. & W. Garage and Tours Company, to the effect that on June 13, 1928, said firm transported from Colorado Springs a party of tourists to the summit of Pikes Peak and that in connection therewith an additional trip was given free. On June 22 the Commission made an order requiring the respondents to show cause why their certificate should not be revoked. The respondents wrote a letter to the Commission stating frankly that they had given two trips on the day in question to a party of tourists at the price of one but stated that they did not know they were violating the law or their tariff. The case was duly set for hearing and was heard in the hearing room of the Commission on July 20, 1928.

The evidence showed that George J. Wetherald, one of the co-partners, told a representative of a large party of tourists that if he would get him a load or two of passengers he would take them to Pikes Peak by way of the Cave of the Winds without making any additional charge for that part of the trip to the cave. The cave trip is not combined with the Pikes Peak trip
P.U.R.1928E.

in the tariff of the respondents or any of the other operators in the Pikes Peak region. In all of their tariffs the Cave of the Winds trip is one for which an additional and separate charge is to be made. However, the said Wetherald testified in all apparent sincerity that he did not realize that the making of this trip via the Cave of the Winds was a violation of his tariff. After all the conferences and hearings the Commission has had in Colorado Springs at which the sightseers of that region have been present, and after repeated questions made by the Commission to operators whether they were familiar with the rules and regulations of the Commission, it is difficult to understand how at this late day such a violation of the tariff and the law could be made innocently by an operator. However, the Commission is inclined to give the respondents the benefit of the doubt and instead of revoking their certificate concluded to suspend it for a reasonable time. The Commission, therefore, suggested that it would take such course. Thereupon the said George J. Wetherald proposed that in lieu of the suspension he be allowed to pay some reasonable amount as or in the nature of a fine. The Commission pointed out that it is doubtful whether under the law it has the power to fine an operator, but stated to the representative of the firm that if he so desired he would be permitted to pay \$50 to the secretary of the Commission to be turned into the state treasury in lieu of a suspension of the certificate.

The payment of \$50 has been made to the secretary of the Commission. There remains nothing further but to dismiss the proceeding.

ILLINOIS COMMERCE COMMISSION.

RE BOARD OF TRADE WAREHOUSE CORPORATION.

[No. 17662.]

Monopoly and competition — Commercial domination — Grain ware-houses.

1. A plan for the leasing of all grain housing space in a certain district by a corporation having directors who are members of the Board of Trade, for public use, reserving the privilege to private lessors to store their own grain, is not illegal because of the fact that the direc-

tors may have an interest in the private space to be so converted, but is unlawful where they have an interest in the grain in the public bins over which they have control, p. 73.

Monopoly and competition — Illegal interest by warehousemen.

2. It is illegal for any owner of grain whether or not he be the owner of a private grain elevator converted into public space, to operate public space wherein his grain is stored, p. 73.

Intercorporate relation — Unlawful monopoly — Corporate fiction — Warehouses.

3. Where an unlawful monopolistic result is found to exist by the use of a device which gives control over the use of public space to those who admittedly own the grain stored therein, a liberal construction of statute in favor of the public, disregarding the corporate fiction should be employed in the determination as to whether such device for control is, in fact, operation in such space, p. 73.

Monopoly and competition — Machinery for grain monopoly — Warehouses.

4. The machinery of an absolute monopolistic control of public warehouse space in the Chicago area would be created where the Board of Trade have exclusive power to license class "A" warehouses vitally affecting the future grain trading of the nation, and where the directors of such Board control the voting stock of a corporation having absolute power over the operation of all such storing space, p. 74.

Monopoly and competition — Control of monopolies created by legislature.

5. The use of the machinery of monopolistic control should be carefully circumscribed to prevent abuse, notwithstanding the creation of the possibility for such machinery by legislative acts, p. 74.

Statutes — Legislation not repealed by subsequent laws — Warehouses.

6. Where the latest warehouse act did not repeal or modify provisions of previous legislative regulation of such utilities, proposals affecting the subject must be considered in the light of all existing legislation, p. 75.

Discrimination — Service — Grain storage proposal.

7. A proposed plan permitting certain lessors of warehouse space to reserve privileges for their own grain upon a mere statement, but requiring all other persons to tender grain before storage space could be demanded, was held to be a violation of statute prohibiting discrimination between persons desiring to avail themselves of warehouse facilities, p. 75.

Warehouses — Publication of space available — Privileged lessors.

8. A proposed plan permitting lessors of warehouse space to exercise optional rights over the amount of storage space available for their own future use and making the public demand subject to such option, was held to be a violation of a statute requiring warehouses to publish at specific periods detailed information for the public concerning the amount of storage space available for public use, p. 76.

Discrimination — Warehouses — Illegal preference — Exclusive information.

9. A proposed plan for the regulation of grain storage which will permit a certain group of dealers to obtain information, unavailable to the public, concerning the amount of space vacant, thereby giving such group an advantage over the market, was held to contain an illegal preference, p. 76.

Intercorporate relations — Illegal status of warehouse directors.

10. Participation as directors of a warehouse corporation by owners of interest in grain, which permits the combination of a majority of such directors, for their mutual private benefit, is the "operation" of a warehouse by persons having an interest in commodities stored therein within the meaning of a statutory prohibition against such operation, p. 77.

Constitutional law — Grain monopoly — Warehouses — Illinois.

11. A proposed plan for the regulation of grain storage space which allowed three directors, themselves traders, of a warehouse corporation to have exclusive information as well as the machinery of control of all the potential warehouse space in the market to their own advantage, permitting a disorganization of national and international grain markets, was held to be inconsistent with the public policy established by Article XIII of the Constitution of Illinois, p. 77.

[July 12, 1928.]

APPLICATION of a warehouse Corporation formed by the Chicago Board of Trade for a certificate of convenience and necessity to construct and operate Class "A" public grain warehouses in the city of Chicago by leasing empty bins in private elevators and operating such bins as public grain warehouses; application denied.

By the Commission: On September 15, 1927, the Board of Trade Warehouse Corporation, a corporation organized and existing under and by virtue of the laws of the state of Illinois, and herein referred to as "Warehouse Corporation," filed its application with the Illinois Commerce Commission for a certificate of convenience and necessity to construct and operate Class "A" public grain warehouses on the "flexible unit plan" by leasing empty bins in private elevators and operating such bins as public grain warehouses.

Pursuant to notice, as required by law and in accordance with the rules and general orders of the Illinois Commerce Commission, hearings were had upon the application filed herein at the P.U.R.1928E.

office of the Commission at Chicago, Illinois, on many days between September 27, 1927, and April 24, 1928.

At these hearings so held all parties, who, in the opinion of the Commission, might have any interest in the outcome of the proceeding, were notified and given an opportunity to present such evidence and such facts as might be relevant and helpful to the Commission in its determination of the case; at such hearings the warehouse corporation was represented by counsel and other interested parties appeared either by counsel or in person.

In the judgment of the Commission, in so far as it is necessary to detail for this opinion, the plan provides that the Warehouse Corporation shall have a capital stock of \$50,000, all of which will be owned by the board of trade of Chicago. The warehouse corporation will enter into contracts with seven owners, lessees or sub-lessees (herein referred to as "Lessors") who operate eighteen elevators, having an aggregate storage capacity of 32,600,000 bushels, all located in the Chicago district. The form of the contract, as filed herein, provides that the warehouse corporation shall have the right to lease bins in any or all of these elevators, which bins shall thereafter be placed in charge of employees of the warehouse corporation and operated by it as Class "A" warehouse space on the "flexible unit plan" under the Warehouse Act of 1927, and as regular space under the rules of the board of trade. But the leasing of these bins will be made only upon the following conditions: whenever any of the Lessors has grain which he desires to store in Class "A" space, such Lessor may designate the bins in his own warehouse which are empty and available for the storage of such grain and the warehouse corporation shall then take over and operate these bins as Class "A" space, under form leases, and it shall then fill them up with the Lessor's grain when and as tendered to it for storage. Whenever any person other than the Lessors tenders grain for storage to the warehouse corporation, it must demand the necessary space from any or all of the Lessors who have empty bins in his or their elevators available for storage of grain. If such space is available, the bins are leased to the warehouse corporation and the grain tendered stored therein. The Lessors are to keep the warehouse corporation advised from time to time as to the P.U.R.1928E.

amount of vacant space in their respective elevators, and the allocation of the storage of grain tendered by persons other than the Lessors shall be among the latter "in proportion to their respective capacities." The contract provides that with the approval of the warehouse corporation and the board of trade, other elevator operators having available storage may become parties to this plan upon the same terms and conditions as the original Lessors.

"The warehouse corporation shall have five directors, all of whom shall be members of the board. The stock of the warehouse corporation shall be voted by the president of the board, subject to the direction of its board of directors, and he shall vote such stock so that there shall always be on the board of directors of the warehouse corporation two persons nominated by the elevator companies, two members of the board who have no elevator affiliations, and one officer of a Chicago bank who has no elevator affiliations."

The Commission, having considered all of the evidence offered and having heard the statements of counsel and being fully advised in the premises, upon consideration thereof, finds that:

The plan is an attempt to operate Class "A" warehouse space under the Warehouse Act of 1927. It is a departure from the method of public warehousing of grain in operation in this state since 1885, and is without precedent. A brief consideration of the public policy and conditions leading up to the enactment of the Warehouse Act of 1927 will be helpful in determining the validity of this plan.

The present body of the law regulating public warehousing of grain is intended to carry out the provisions of Article XIII of the Constitution of 1870. This article defines public warehouses, prescribes duties of public warehousemen, and directs legislation to carry out the article "which shall be liberally construed so as to protect producers and shippers." By the Warehouse Act of 1871, public warehouses were divided into Classes A, B, and C, public warehouses of Chicago coming within the classification of Class A.

In *Central Elevator Co. v. People ex rel. Moloney*, 174 Ill. 203, 51 N. E. 254, the supreme court of Illinois held that a Class P.U.R.1928E.

"A" warehouseman had no right to store or mix in his public warehouse grain in which he had an interest, direct or indirect, as such action was inconsistent with and adverse to his duty to these whom he was bound to serve. In *Hannah v. People ex rel. Attorney General*, 198 Ill. 77, 64 N. E. 776, the supreme court of this state held that this prohibition was created by Article XIII of the Constitution of 1870 and that such prohibition, therefore, could not be removed by any act of the legislature.

In 1927 the Legislative Grain Marketing Investigating Committee of the house of representatives of this state, after an exhaustive investigation, reported (House Journal 51, Pages 28-33, June 9, 1927), that the public warehousing situation in Chicago was "disorganized and in confusion," because of the existence of two sets of conditions, both of which when taken together operated to the public detriment: (a) the existence of practices used by public warehouse operators to create a personal interest in grain stored in their respective public elevators; (b) the existence of a dovetailing relationship between the matter of public warehousing of grain and certain rules of the board of trade, which together could be used to create "arbitrary and unnatural fluctuation of prices, which were not based upon economic conditions nor upon the laws of supply and demand." The report found that "through his public elevator affiliation, and the special advantages and power given to the operator, as a result of the practices which grew up in connection therewith, the operator group was able to, and in fact did, for many years procure control of and dominate the policies of the Board of Trade;" that by the advantage of its position the elevator group in certain instances did bring about arbitrary fluctuation of prices to the detriment of public welfare. The rules of the board of trade referred to, involve the matter of valid delivery of grain on future contracts. Such delivery is limited to warehouse receipts of warehouses licensed by the board of trade and declared "regular." Only Class "A" warehouses may be declared regular. To this general rule of delivery there are two exceptions: (a) the tender of grain in cars on the last three days of the delivery month; (b) the tender of grain in cars at any other time within P.U.R.1928E.

the delivery month if the board of directors of the board of trade declares that an emergency exists because of the lack of regular warehouse space in the Chicago district. It is obvious that a tender of grain in cars, if made suddenly and in large amounts, will depress the price of the grain involved through increasing demurrage and insurance charges, and depreciation through the elements. Such depression will naturally be reflected in the price of all grain then being bought or sold. As the necessity for the emergency rule depends on the amount of available regular space, the close connection between these rules and the matter of public warehousing becomes apparent.

The Committee recognized, however, that as a result of economic conditions, the public warehousemen had become large merchants of grain and that such activity was, in fact, the principal function of this group. To reconcile the public policy of this state with present economic conditions, the Committee recommended and the legislature enacted the Warehouse Act of 1927.

By this act the matter of regulating the warehousing of grain by the board of trade is placed under state supervision and all rules and regulations of the board relating thereto are made subject to such regulation in the public interest. The act also provides two methods of public warehousing of grain: 1. Warehouse space may be set aside as public space, in advance of such use, by application to the Illinois Commerce Commission, in which case the operator of such space cannot, so long as it is public space, store or mix therein any grain in which he has an interest, upon penalty of fine or imprisonment. 2. Private warehouse space may be set aside as needed to store public grain, in which case the operator, at the time of and so long as the space is made and continued as public space, cannot have any direct or indirect interest in the grain so stored.

The act defines "direct or indirect interest" in a manner and with a liberality far beyond that involved in the facts before the court in *Central Elevator Co. v. People ex rel. Moloney, supra*, or in any other case in this state, or any other of the grain states of the United States or in Canada. In fact, the Supreme Court of the United States in defining the same words in the commo-

ties clause of the Hepburn Act (United States ex rel. Attorney General v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527) refused to make such construction. Under the Act of 1927, an interest is declared illegal which involves the following: Ownership of grain by the warehouseman, or by a substantial stockholder of the warehouseman or by a corporation, a substantial part of the stock of which is owned by the warehouseman, or by a corporation, having substantially the same stockholders as the warehouseman, or grain sold to go to store where the warehouseman, or substantial stockholder of the warehouseman, or a corporation having substantially the same stockholders as the warehouseman, or a corporation affiliated with the warehouseman agrees to repurchase the same or similar grain, or "Any other device or subterfuge whereby the warehouseman shall have or acquire any interest direct or indirect in the grain stored in any such warehouse operated by him."

The first method sanctions the operation of Class "A" warehouses in practice for fifty years but condemns the business of merchandising of grain by such operators. Under this method several of the Lessors, who are parties to the plan under consideration, have procured permits from this Commission to operate their warehouses as Class "A" space.

The present application is an attempt to make use of the second method of operation permitted by the Act of 1927. Under the first method of operation the question, since the Central Elevator Company case, has been whether there was "direct or indirect interest" in the grain by the person admittedly operating the public space. But by the Act of 1927 the nature of such interest was clearly defined and settled. Under the second method, one of the principal questions is whether there is "operation" of the public space by those who admittedly can or do have an interest in the stored grain. This question arises from the fact that the plan recognizes the right of any Lessor to store his grain in the public bins of the Warehouse Corporation; the right of any Lessor or substantial stockholders of any corporation owning the majority of the stock of any Lessor, to be a member of the board of directors of the warehouse corporation; and the P.U.R.1928E.

right of any other member of the board of directors, who has no other elevator affiliations, to store his grain in the public bins under the control of the warehouse corporation.

[1, 2] The agreement filed as part of the application states that it is the intention of this plan "to bring about a condition where the ownership, control, or operation of the public grain warehousing of Chicago will be entirely disassociated from all persons or corporations who own, control, operate or have an interest in the private grain elevators of Chicago." The above analysis of the public policy behind the constitutional and legislative provisions regulating public warehousing shows clearly that this expressed intention is too narrow. It is just as illegal for members of the board of directors of the warehouse corporation who have no elevator affiliations to operate the public bins, in which is stored grain owned by them, it being on the board of directors constitutes operation of such public bins, as for the directors who have elevator affiliations to operate such public bins under the same conditions. The illegality of the plan does not depend upon the fact that the members of the board of directors have an interest in the private grain elevators but upon the fact that they have an interest in the grain in the public bins over which they have control. The question, therefore, boldly stated is: Do the directors, who admittedly may have an interest in grain stored in the public bins of the warehouse corporation, operate such bins? If the answer is in the affirmative, then the combination of interest and operation is in violation of law. Under the "flexible unit plan" permitted by the warehouse act of 1927, the present public warehouse operators, as merchants, are recognized like other merchants of grain, who have no elevator affiliations. It is illegal for any owner of grain, whether or not he be the owner of the private elevator converted into public space, to operate public space wherein his grain is stored, if under the law his being on the board of directors is held to operate said public space. The failure of applicant in the pending case to recognize the real question involved has led to many difficulties below indicated.

[3] Neither the courts nor the legislature have defined what
P.U.R.1928E.

is meant by operation and we are, therefore, in virgin territory. But we are not at a complete loss in the manner of approach to the definition. As already noted, the public policy declared by the courts and the legislature was aimed to condemn the simultaneous existence of both operations of public space and ownership of grain stored therein. Following the constitutional mandate, the courts and the legislature construed liberally in favor of the public the matter of ownership of grain to eliminate an evil result in cases where the operation of the public space, wherein such grain was stored, was admitted. This liberality of construction has destroyed the fiction of corporate reality to an extent no found in any other similar situation. Where the same evil result is found to exist by the use of a device which gives control over the use of public space to those who admittedly own the grain stored therein, the same liberal construction in favor of the public should be employed in the determination as to whether such device for control is, in fact, operation of such space.

[4, 5] But further than that, the Supreme Court of the United States in *Munn v. Illinois* (94 U. S. 113, 24 L. ed. 77), after pointing out that the Constitution of 1848 made no mention of warehousing, commented with reference to Article XIII, that something must have happened in the previous twenty years which led the people to be against monopolies. The Court pointing out the abuses and evil results which had occurred, concluded that Article XIII and the legislation enacted pursuant thereto should be construed as an attempt by the people to destroy the abuses of monopoly control of the business of warehousing. It is obvious and, in fact, applicant herein admits, that the plan presented in the above entitled case contemplates that the warehouse corporation have monopoly control of public warehousing of grain in the Chicago district. This monopoly control will include not only the present public space, aggregating about 16,000,000 bushels, but also practically all of the private warehouse space in the district available for public storage of grain. The monopoly control, therefore, is even broader in its scope than that existing in 1870, when only public warehouse space was included. When to this intention of the warehouse corporation is added the
P.U.R.1028E.

fact that the Chicago market is the greatest future market in the world; that the matter of future trading has been declared by Congress and by the Supreme Court of the United States to be a matter of national public interest (Board of Trade v. Olsen, [262 U. S. 1, 67 L. ed. 839, 43 Sup. Ct. Rep. 470]), that the backbone of future trading is grain stored in regular warehouses, represented by warehouse receipts; that only Class "A" warehouses may be declared regular; that Class "A" warehouses must be licensed yearly by the Board of Trade to be regular; that it is within the sole and uncontrolled power of the board of directors of the board of trade to issue and to revoke such licenses (Rules and Regulations of the board of trade, March 1, 1928, Chap. 36), and that the same board of directors directs the voting of the stock of the Warehouse Corporation; that all of the directors of the Warehouse Corporation may be members of the board of directors or the board of trade; the machinery to create an absolute monopoly of Class "A" regular warehouse space in the warehouse corporation has been created. It may be said that the legislature has made such monopoly possible. Even if that be so, nevertheless the use of the machinery of monopoly control should be carefully circumscribed to make its abuse impossible. In the light of the experience under monopoly control which led to the constitutional prohibitions above referred to, and the mandate of the people through their Constitution to construe legislation enacted pursuant thereto liberally in favor of "shippers and producers," this Commission should view the plan submitted with the closest scrutiny in their favor.

[6] Moreover, the Warehouse Act of 1927 did not repeal or modify the provisions of previous legislation regulating public warehousing of grain; the provisions of the plan submitted must be considered in the light of all existing legislation.

Applying these rules of construction to the plan submitted the Commission finds that it violates several separate laws of this state, and is inconsistent with the public policy established by Article XIII of the Constitution of 1870.

[7] 1. Section 6 of the Warehouse Act of 1871 (R. S. 1874, 821) provides that the Class "A" warehouseman must receive P.U.R.1928E.

grain tendered to him in the ordinary course of business, "not making any discrimination between persons desiring to avail themselves of warehouse facilities." Under § 3 of the General Contract filed herein as part of the plan submitted, the respective Lessors may reserve space for storage of their grain without tendering the grain, but merely upon representation that they "own" grain which they "desire to store in a public warehouse." Under § 4 of the General Contract, any other person must tender the grain for storage before he can demand space. This is clearly an illegal preference. That such preference is not illusory may be seen from the fact that the certainty of procuring public space in a big-crop-year may give the beneficiary a decided advantage in arranging purchases and may discourage purchases by others.

[8] 2. Section 12 of the Warehouse Act of 1871 requires Class "A" warehousemen to publish weekly the amount and kind of grain received in and shipped from store, and to publish daily the amount of grain received and shipped from store, and what warehouse receipts were cancelled. As the aggregate amount of Class "A" space, under the method of public warehousing now used, is fixed by license from the state, the public can determine from day to day the available public space. The plan submitted does not contain any such feature. The amount of available space for public storage will be the aggregate amount of private space operated by the Lessors, less the amount of private space filled up by the Lessors, less the amount of private space withheld by the Lessors to meet their own future requirements for private stock, less the amount of private space turned over to the warehouse corporation but reserved as public space pending the use by the Lessors, less the amount of public space filled with grain by the Lessors and by others.

[9] Section 6 of the General Contract makes provision for information as to the vacant private space. To enable the warehouse corporation to allocate the public storage of grain of others than Lessors, the Lessors "Shall keep the Warehouse Corporation advised from time to time as to the amount of vacant space in their respective elevators or warehouses." As the information
P.U.R.192SE.

provided for relates to private space, the law cannot compel the warehouse corporation to make the same public. As the information provided for is intended for a specific purpose, there is no general or special authority granted to the warehouse corporation by the Lessors to make the same public. But as the directors of the Warehouse Corporation exercise its corporate powers, they will necessarily have available to them all of the information so furnished. Therefore, the five directors of the warehouse corporation and no other members of the board of trade or the public will have the benefit of the necessary information showing the amount of available Class "A" space in Chicago. *Central Elevator Co. v. People ex rel. Moloney*, 174 Ill. 203, 51 N. E. 254, is conclusive for the proposition that those who serve the public cannot place themselves in a position of advantage over those whom they are bound to serve. As at least four of the directors may legally act as dealers in grain under the plan submitted, their advantage through this illegal preference is very great.

[10, 11] 3. Section 21 of the General Corporation Act of Illinois provides that the directors "shall exercise the corporate powers of the corporation" and shall "elect officers and shall appoint such agents and factors as may be necessary or desirable." Under the plan submitted, each of the five directors may trade in, and it contemplates that, eliminating the bankers, they will operate as traders or merchants. Nor is there any restriction upon the right of any director to do business with or accept business from any other director. If it be said that each director, through participation in the management of the warehouse corporation, has an interest in the operation thereof, then his having an interest in the grain stored therein is illegal. This would make § 3 of the General Contract relating to the deposit of grain by the Lessors illegal and would disrupt the whole scheme of calculating rentals under § 7 thereof. It would also limit the selection of the directors to members of the board of trade who are not active traders. If mere participation in management by each director is not operation in itself, certainly such participation which permits the combination of a majority of the direc-

tors, for their mutual private benefit, when they should represent adverse interests, should be held to be operation.

As a practical matter, the plan would make possible the control by a majority of the directors consisting of two traders and one warehouseman or two warehousemen and one trader of all the available warehouse space in the Chicago district and by manipulations to use such control to disorganize the whole Chicago market. True the capacity under the plan is 32,000,000 bushels as compared to 16,000,000 now used as Class "A" space. But the actual amount of increase is much smaller. Normally, at least one-half of the private space is at all times filled up to meet the needs of the warehousemen as merchants. This reduces the amount of increased space over the present public capacity to 8,000,000 bushels. When it is considered that there are at least 150 different varieties of grain, by grade and kind, and that through the storage of a single car of 1,500 bushels of each such varieties, bins of capacity from 6,000 to 34,000 bushels can be rendered unavailable for storage of other grain, and when it is considered that the Lessors, including those serving on the board of directors, may reserve an unlimited amount of public space before any grain is delivered, the power of those controlling the management and allocation of the public space more than offsets the increased theoretical potential space for public storage.

The Supreme Court of the United States, in *Board of Trade v. Olsen* [262 U. S. 1, 67 L. ed. 839, 43 Sup. Ct. Rep. 470], pointed out the dangers of the emergency rule of the board of trade relating to car-lot-deliveries, above described, and the fact that the existence of the unregulated power of the directors to invoke the rule "adds to the speculative character of the market and frightens consignors." Certainly if such contingency exists when the Board of Directors consists of eighteen members, the probability of creating the situation requiring the invocation of the emergency rule by three directors of the Warehouse Corporation is even more dangerous. *Central Elevator Co. v. People ex rel. Moloney (supra)* established the principle of prohibiting future possible action rather than past misconduct. The findings of the Legislative Grain Marketing Investigating Committee, al P.U.R.1928E.

ready referred to, reveal the prophesy of that court as a reality of subsequent history. The conclusion is inevitable that no machinery should now be created, which will create the arbitrary and preferential treatment such as is by this plan made possible.

Moreover, this plan must be viewed in the light of the relationship of the warehouse corporation to the board of trade itself and to the public. This Commission must take notice that the members of the board of trade are subject to disciplinary rules and that objections to this plan or its operation, if raised by such members, may subject them to severe penalties at the hands of those in control of the machinery of both institutions. It is singular indeed that in this plan, which should be created to protect the "producers and shippers" under Article XIII of the Constitution, no machinery has been provided by which these interests, or this Commission on behalf of the public, can readily learn the operations of the warehouse corporation until after action has been taken by its directors, whose position has been created by this plan, adverse to such outside interests.

Certainly the Chicago market, which is the greatest grain market in the world, should not be placed in the unregulated control of three persons, who alone have the benefit of necessary information; who can make use of the facilities of the corporation in their own business; who in the course of such use have available, if they so desire, the machinery of control of all the potential warehouse space in the market, to their own advantage; who, through such use, can produce a condition of disorganization and demoralization of the grain trade in Chicago and in the world markets. In the light of the events leading up to the enactment of the Warehouse Act of 1927, the warehouse corporation cannot maintain that the legislature contemplated that the act would permit such conditions and this Commission in administering the act should not sanction the attempt.

There are indeed many features under the plan submitted which, if properly administered, can be used to greater public advantage than under the existing method of public warehousing. But the success of and public benefit to be derived from the plan depends entirely on the manner in which the management is de-

P.U.R.1928E.

terminated. The Supreme Court of the United States held in *Board of Trade v. Olsen (supra)*, that "the board of trade conducts a business which is affected with a public interest." The plan submitted is intended to be part of the operations of the board of trade. If the board intends such plan to be in the public interest, certainly the machinery of this plan should be revised radically to eliminate preferential treatment in favor of part of the public; to eliminate the existence of an adverse relationship between the managers of the warehouse corporation and those whom they are bound to serve; and to make readily available to the public or their representatives the nature of the operations of the corporation before action has been taken which may result in public harm.

It is therefore ordered by the Illinois Commerce Commission that the application of the Board of Trade Warehouse Corporation for a certificate of convenience and necessity to construct and operate Class "A" public grain warehouses on the "flexible unit plan," by leasing empty bins in private elevators and operating such bins as public grain warehouses should be, and the same is hereby, denied.

CALIFORNIA RAILROAD COMMISSION.

RE PACIFIC TELEPHONE & TELEGRAPH COMPANY.

[Decision No. 20017, Application No. 14608.]

Valuation — Purchase price of controlling stock — Charge to capital.

1. The authorization of a purchase of the controlling stock in one utility by another does not determine the amount of such purchase price which may be charged to fixed capital accounts at such certain time as the properties may be acquired, p. 82.

Consolidation, merger, and sale — Effect on collateral proceedings.

2. A complaint of a city seeking an extension of exchange boundaries will not be prejudiced in any manner by the granting, in another proceeding, of authorization to purchase the stock of the utility involved and a motion that hearing on the latter question be continued will be denied, p. 82.

[July 9, 1928.]

P.U.R.1928E.

APPLICATION of a telephone company for authority to purchase outstanding capital stock of another utility; approved.

Appearances: Pillsbury, Madison & Sutro, Lawler & Degan, and James G. Marshall, for applicant; John K. Hull, City Attorney, for the city of Long Beach, protestant; C. A. Bland, representing the Long Beach Chamber of Commerce, protestant.

By the **Commission:** The Pacific Telephone & Telegraph Company asks permission to purchase at a cost of \$260,000 from Pierce, Fair & Company 774.4 shares of the common capital stock and 103 shares of the preferred stock of the Consolidated Utilities Company. It further asks permission to acquire the balance of the issued and outstanding common and preferred stock of the Consolidated Utilities Company if the same can be acquired at a reasonable price.

The Consolidated Utilities Company is engaged in a general telephone business in the city of Compton and vicinity, in Los Angeles county. The company has three central offices: one at Hynes, one at Compton and one at Gardena. As of February 29, 1928, the number of telephone stations in operation is reported at 2658.

The Consolidated Utilities Company reports outstanding \$61,700 of preferred stock and \$80,590 of common stock. In the petition, filed in this proceeding, the Pacific Telephone & Telegraph Company asks permission to purchase \$10,300 of the preferred and \$77,440 of the common.

At the hearing had on this application evidence was submitted showing that since the filing of the petition, the Pacific Telephone & Telegraph Company has been offered the remaining outstanding common stock, namely, \$3,150 (31½ shares), at \$150 per share. The record also shows that while applicant is willing to purchase the \$51,400 of preferred stock it will not pay more for such stock than \$105 per share, the price at which the preferred stock may be called for redemption.

There has been filed in this proceeding a stipulation by the Pacific Telephone & Telegraph Company in which it agrees for itself, its successors and assigns, that the price which it will pay for the stock of the Consolidated Utilities Company will

P.U.R.1928E.

not be claimed by it before the Commission or other public authority as representing, for rate fixing or any other purpose, the fair value of the property of Consolidated Utilities Company.

As of February 29, 1928, the assets and liabilities of the Consolidated Utilities Company are reported as follows: [Table omitted.]

[1] This proceeding does not involve the transfer of the properties of the Consolidated Utilities Company. While the order herein will permit the Pacific Telephone & Telegraph Company to purchase the outstanding stock of the Consolidated Utilities Company, it should be understood by the purchaser that we have made no determination of the amount of such purchase price which may be charged to fixed capital accounts at the time the properties of the Consolidated Utilities Company may be acquired by applicant.

Representatives of the city of Long Beach and of the Long Beach Chamber of Commerce moved at the outset of the hearing on this application that such hearing be continued, in order that they might more fully investigate the request of applicant and the relation, if any, of such request to the issues raised in the complaint filed on June 21st by the city of Long Beach (Case No. 2564) against the Consolidated Utilities Company and the Associated Telephone Company. In that complaint the city asks the Commission that certain territory referred to in the complaint be severed from the district now served by the Consolidated Utilities Company and that the exchange boundary line of the district of Long Beach now being served by the Associated Telephone Company be extended so as to include said area within the city of Long Beach and that the Associated Telephone Company be authorized to establish individual party and subsidiary telephone service to the territory under the existing authorized regulations and rates provided for such service by the Railroad Commission.

[2] The Commission has considered the motion made by representatives of the city of Long Beach and its chamber of commerce and is of the opinion that such motion should be denied, for the reason that the issues raised in the complaint and the issues presented in this application are not related.
P.U.R.1928E.

It appears to us that the two proceedings are distinct and separate and that the city's complaint will not be prejudiced in any manner by the granting of this application, which involves only a transfer of the control of Consolidated Utilities Company.

CALIFORNIA RAILROAD COMMISSION.**RE TRUCKEE RIVER POWER COMPANY.**

[Decision No. 19982, Application No. 14556.]

Monopoly and competition — Protection of deficient utility.

1. The Commission will not, except under the most unusual circumstances, permit an existing public utility which has not done its duty to the public to keep its field to itself by agreeing that it will henceforth improve its service or lower its rates, or in any other respect comply with its full duty to the public, p. 85.

Monopoly and competition — Protection of deficient utility.

2. The Commission does not feel any obligation resting upon it to protect the investment of a utility which is not doing its full duty to the public, p. 86.

Service — Jurisdiction of Commission.

3. It is not incumbent upon the Commission to determine whether or not a utility district has complied with all requirements of law in the organization of such districts, p. 86.

[July 3, 1928.]

APPLICATION of a power company to extend electric service into a certain town; application approved.

Appearances: Orrick, Palmer & Dahlquist, by T. W. Dahlquist, for applicant; T. L. Chamberlain, for Truckee Public Utility District, interested party; Devlin & Brookman, by Douglas Brookman, for Truckee Electric Light & Power Company and Paul M. Doyle, protestants.

By the **Commission:** This is an application by Truckee River Power Company, a corporation, requesting this Commission to grant applicant a certificate of public convenience and necessity to extend its electric service into the town of Truckee and to amend a certain agreement dated April 7, 1924, between P.U.R.192SE

applicant and Truckee Electric Light & Power Company and Paul M. Doyle.

Truckee River Power Company has, since the filing of this application, changed its name to Sierra Pacific Power Company, and this latter title will, therefore, be used throughout this opinion and order.

Hearings were held before examiner Gannon in the town of Truckee, on May 17 and June 4, 1928, at which time testimony was introduced and the matter submitted on brief. Applicant desires to extend its electric service into the town of Truckee for the purpose of supplying energy to Truckee Public Utility District. Truckee Electric Light & Power Company and Paul M. Doyle protested the granting of the application, while Truckee Public Utility District intervened in favor thereof.

A brief history of the circumstances surrounding this application may be pertinent at this point. It appears that Truckee Electric Light & Power Company has been, for many years, the sole agent supplying electric energy to the people in and around the town of Truckee, and that due to alleged excessive rates and inadequate service, a public utility district was formed by the people of Truckee for the purpose of distributing and selling electric energy in competition with the company. It also appears that this Commission, in its Decision No. 13784, dated July 8, 1924, granted applicant a certificate of public convenience and necessity to exercise certain rights and privileges of franchise in the county of Nevada (Ordinance No. 226), but expressly excluded service to the town of Truckee, except to such degree as was necessary to deliver power to the Truckee Electric Light & Power Company. Prior to the granting of this certificate applicant entered into an agreement with the Truckee Electric Light & Power Company and Paul M. Doyle, covering such sale and purchase of electric energy.

The testimony shows that applicant has made an investment of approximately \$20,000 to serve Truckee Electric Light & Power Company and that if the Truckee Public Utility District is not permitted to purchase power from it, its investment will be jeopardized, as the district will, in that event, generate electric energy by a Diesel plant. The utility district has already P.U.R.1928E.

built its distribution system and has received applications for service representing approximately 95 per cent of the consumption in Truckee, exclusive of the Southern Pacific Company load.

It is clear from the record that rates, public relations, and service in Truckee have been far from satisfactory and it is also of record that no complaint of service or rates was pressed with this Commission, although correspondence afforded ample opportunity for and invited such action.

We have then a unique situation. A public utility district has been formed and a distribution plant has been constructed without any assurance that this source of energy would be available. The usual method of resorting to eminent domain proceedings to acquire the existing utility's property has been disregarded in the apparent confidence on the part of the district officials that this Commission must extricate the district from its difficulties. Had not the applicant been moved to protect its interests and seek modification of the order above referred to, it would seem that the district would now be faced with a very serious situation.

[1] Denial of the application would force the district to a more expensive source of energy, which will react to the detriment of applicant, and incidentally, to the detriment of the district and the benefit of protestants. We feel that applicant, and applicant alone, merits our consideration. Protestants have forfeited their right to special consideration through failure to render a proper service and while Mr. Doyle, testifying for the protestant company, outlined a program of improvement which would apparently put his service upon a higher plane, his promises come too late. The principle laid down by this Commission in an early case (Re Oro Electric Corp. 2 Cal. R. C. R. 748, 770) is here directly applicable:

We wish to be distinctly understood as announcing that we will not, except under the most unusual circumstances, permit an existing utility which has not done its duty to the public to keep its field to itself by agreeing that it will henceforth improve its service or lower its rates or more completely serve the field or in any other respect comply with its full duty to the public.
P.U.R.1928E.

[2] The Commission does not feel any obligation resting upon it to protect the investment of a utility which is not doing its full duty to the public.

It is apparent, with all the facts before us, that the application for modification of the certificate should be granted. It follows that the contract between applicant and protestants should be modified, both as to minimum revenue guarantees and demand charges, as transfer of load to the utility district which can be expected will materially alter conditions from those that have existed in the past and under which the present contract has applied. Such modification of the contract will be covered in the order.

[3] It is not incumbent upon the Commission to determine whether or not the utility district has complied with all the requirements of the law in the organization of such district and this question is in no way involved in this proceeding.

CALIFORNIA RAILROAD COMMISSION.

BAY AND RIVER BOAT OWNERS' ASSOCIATION et al.

v.

JOHN ANDERSON et al.

[Decision No. 19977, Case No. 2319.]

Rates — Vessels — Size of shipment.

1. A showing that the land in the area served by vessels has, of recent years, been farmed in relatively small tracts and the tonnage broken into small consignments requiring frequent handlings, is pertinent in a general way in a rate proceeding, but in the final analysis the financial results of operation must be given controlling weight, p. 90.

Depreciation — Percentage allowed — Vessels.

2. An allowance for depreciation was made of 5 per cent on vessels where the evidence showed that the average life of the hulls was at least twenty years, and the life of the machinery therein of a considerably longer duration, p. 91.

Depreciation — Necessity for correct computation — Vessels.

3. It is fundamental in a rate proceeding that depreciation, being an important item of expense, and a proper charge, should be correct and proven in order to determine accurately the financial condition of the carriers involved, p. 91.

P.U.R.1928E.

Discrimination — Duty to inform Commission of departure from schedule.

4. It is the duty of public utility carriers to lay before the Commission all facts within their knowledge tending to show that rival carriers are departing from published tariffs, p. 94.

Rates — Statutes prescribing uniform rates — When applicable.

5. A section of the Public Utilities Act (§ 32) granting the Commission power to prescribe uniform rates must apply to situations where there are uniform circumstances and conditions and when the uniform rates can be made to apply to every operator performing a similar utility service in a territory involved, p. 94.

Rates — When uniform rates not applicable — Vessels.

6. Where transportation services are by various methods and are totally different, no beneficial results would be secured by the establishment of uniform rates, and in the end would only restrict carriers from voluntarily changing rates, which in many cases may be justified under changing conditions, p. 94.

Rates — Commission power to enforce compensatory rates.

7. The Commission has the power (Public Utilities Act, § 63 b) either upon complaint or upon its own motion to determine whether or not rates reduced by carriers are reasonable and compensatory, p. 94.

[July 2, 1928.]

COMPLAINT of Bay and River Boat Owners' Association to seek an establishment of uniform rates between vessels operating between various points in the vicinity of San Francisco Bay; dismissed.

Appearances: Gwyn H. Baker and Thelen & Marrin, for complainants; Sanborn & Roehl, for California Transportation Company; Crowley Launch & Tug Boat Company; Erikson Navigation Company; Seth Mann and S. A. Everstine, for San Francisco Chamber of Commerce; Edson Abel, for California Farm Bureau Federation; E. W. Hollingsworth and Bishop & Bahler, for California Hay, Grain & Feed Dealers Association; Berringer and Russell; Commercial Hay Company; Hert-Hill Grain Company; Lewis-Simas-Jones Company; Russell and Macauley; A. W. Scott Company; Producers Hay Company; C. B. Westrope and Company; Coulson Poultry & Stock Food Company; Golden Eagle Milling Company; G. P. McNear Company; C. S. Connolly, for Albers Bros. Milling Company; F. A. Somers, for Grangers Business Association; E. B. Smith, for Sperry Flour Company; J. C. Sommers, for Stockton Cham-

P.U.R.1928E.

ber of Commerce; Perry Small, for California Wholesale Potato Dealers Association; Jones & Dall, by W. K. Powell, for N. Fay and Son; Henry G. W. Dinkelspiel, for Bird's Landing Warehouse; E. S. Williams, for Sperry Flour Company.

Whitsell, Commissioner: Complainants and defendants are common carriers by water, operating vessels for the transportation of property between various points on San Francisco Bay and the San Joaquin, Sacramento, Mokelumne, Old and Middle rivers and their tributaries. By complaint filed February 9, 1927, and as amended it is alleged (a) that the present rates in effect via both the complainants' and defendants' lines for the transportation of beans, peas, flour, mill stuff, mill feed, grain, hay, straw, lumber, potatoes, and onions are unduly and unreasonably low, and (b) that the public interest demands, and the future financial welfare of these common carriers requires, the Commission to establish under the provisions of § 32 (c) of the Public Utilities Act the uniform rates, rules and regulations to be observed alike by all carriers.

E. C. Dozier, California Farm Bureau Federation, Sonoma County Farm Bureau, Solano County Farm Bureau, Yolo County Farm Bureau, Sacramento County Farm Bureau, San Joaquin Farm Bureau Federation, and Contra Costa County Farm Bureau intervened in opposition to the complaint.

Public hearings were held at San Francisco June 7 and 8, 1927, January 3 and 4, and February 2, 3, 10, and 11, 1928, and the matters having been duly submitted and final briefs filed May 21, 1928, are now ready for an opinion and order.

While the complaint brings into issue the rates of practically all carriers, some 60 in number, operating on San Francisco Bay and the San Joaquin, Mokelumne, Old, and Middle rivers and their tributaries, the evidence and testimony was directed to only 17 carriers, which complainants claim handle a very large part of the tonnage moving in the territory here involved, and confined principally to their rates between Stockton, Port Costa, South Vallejo, San Francisco, Oakland, and Petaluma and from the delta regions of the Sacramento, San Joaquin, and Mokelumne rivers to the six terminal points just named. The follow-

P.U.R.1928E.

ing statement showing the present and proposed rates on the heaviest moving commodities between representative points is typical of the adjustment sought by complainants; hence it will not be necessary to show the situation in detail.

(Rates in cents per ton of 2000 lbs. except as otherwise noted.)

Commodity	From	To	Present rate	Proposed rate	Percentage of increase
Beans, dried ..	Delta points	Stockton	180	230	28
Peas, dried ..	Delta points	Stockton	180	230	28
Flour	Stockton	Port Costa	140	200	43
Grain	Delta points	Stockton	180	200	11
Grain	Delta points	Oakland	220	280	27
Onions	Delta points	Stockton	*10 cents	*12½ cents	25
Potatoes	Delta points	Stockton	*10 cents	*12½ cents	25

* Rate per sack.

The seventeen carriers specifically before us are the Island Transportation Company, Vehmeyer Transportation Company, Nichols Transportation Company, Empire Barge Company, Wood & Seitz, Dealers Transportation Company, Wheeler Transportation Company, Higgins Transportation Company, Rio Vista Lighterage Company, Stockton Transportation Company, Heringer & Scott, Larkin Transportation Company, Merchants Transportation Company, N. Fay & Son, S. Frederickson, John W. Meyer, and George G. Wright. Complainants contend that for some years there has been strenuous competition between these carriers and the smaller lines for the tonnage, due in some measure to the numerous kinds of services rendered by both common and private carriers operating on the bays and rivers, and to the further fact that the traffic is practically all handled during a comparatively short season, in the summer and fall months. Individual carriers in their endeavor to secure tonnage or for other reasons have from time to time inaugurated reduced rates, and the competing lines in order to secure their share of the movement have invariably met the lower rates. It is claimed this competition has been prevalent for years and has finally placed complainants in a position where their financial security is jeopardized. They take the position that due to the competitive situations it would be useless to seek increased rates unless all the carriers operating in this territory were required to maintain the same rate levels. Thus the two primary issues
P.U.R.1928E.

here for consideration are first, whether or not the rates of complainants and defendants on the heretofore named commodities should be increased, and second, whether or not the Commission should prescribe the rates, rules and regulations to be applied uniformly via all common carriers.

[1] A considerable portion of the evidence and testimony relating to the increased rates was devoted to showing the difficulties encountered in performing a common carrier service on the bays and rivers and the changed operating conditions justifying the rates sought. There appears no doubt from this record that there are hazards prevalent in the operations, particularly with respect to dangerous and inconvenient landings, also that the nature of the traffic has changed in the last few years from large individual consignments to small shipments. Some years ago the land in the delta regions was farmed in large tracts and the tonnage presented to the carriers in very large consignments, but in recent years the land has been farmed in relatively small tracts and the tonnage correspondingly broken into small consignments that require more and more frequent handlings. A showing of this nature is pertinent in a general way, but in the final analysis the financial results of the operations must be given controlling weight.

The annual reports of the seventeen carriers here being considered for the years 1924, 1925, and 1926 show that with the exception of the Island Transportation Company, Wood & Seitz, Heringer & Scott and Wheeler Transportation Company, all earned over the 3-year period an average return in excess of 8 per cent on the property and equipment devoted to the public use, based upon an allowance of 5 per cent for depreciation. On this same 5 per cent depreciation basis the Island Transportation Company and Wood & Seitz operated at a claimed deficit, and Heringer & Scott and the Wheeler Transportation Company earned a small return above operating expenses. In arriving at these results the carriers' claimed value of the property and equipment has been accepted in all cases without modification, as well as the statements of revenues and expenses, except as to the percentage allowed for depreciation. An inventory valuation of the properties devoted to the public service might show either
P.U.R.1928E.

a greater or less value than that carried on the books of the operators.

Counsel for the California Farm Bureau Federation, protestant, argues in his brief that a depreciation in excess of 5 per cent per annum would be excessive because much of the floating equipment employed by the operators in this territory shows an average life in excess of twenty years. The depreciation set up as expenses by these operators will run from 5 to 20 per cent.

[2, 3] Counsel for complainants in their brief maintain that depreciations on a 5-per cent basis is insufficient, and claim that this depreciation should be at least 10 per cent. It may be on a more complete record that a depreciation in excess of 5 per cent could be justified, but on the record before us I am not warranted in accepting anything in excess of 5 per cent as the testimony offered shows that the life of the hulls of vessels is at least twenty years and the life of the machinery therein of a considerably longer duration. The property in use justifying depreciation in excess of 5 per cent per annum, such as automobile equipment, etc., is negligible and will be offset by allowing a full 5 per cent depreciation on the machinery. If an average depreciation in excess of 5 per cent is justified, as complainants contend, the amount thereof should have been shown conclusively, for this proceeding is also an application under § 63 (a) of the act to increase rates, and the burden is upon complainants to justify the proposed rates. It is fundamental that depreciation, being a most important item of expenses, and a proper charge, should be correct and proven in order to accurately determine the financial condition of the carriers.

Complainants maintain that in determining the rate of return earned by the carriers, we should consider them as a whole rather than individually, and in support thereof cite the action of the Director General of Railroads during Federal control and of the Interstate Commerce Commission under the provisions of § 15 (a) of the Interstate Commerce Act in Increased Rates 1920 (58 Inters. Com. Rep. 220), wherein horizontal increases in rates were authorized upon a showing that the rail carriers as a whole were not earning a fair return. If this procedure were followed, the seventeen carriers as a whole, allowing a 5 P.U.R.1928E.

per cent depreciation, earned an average of about 2.5 per cent on the claimed valuation during the years 1924, 1925, and 1926, but this low return is attributable to the adverse showing made by a single carrier, the Island Transportation Company, and with the exclusion of this carrier from consideration the others as a group realized a return in excess of 8 per cent.

The Island Transportation Company claims the average value of its property and equipment devoted to the public use to be \$631,615.55, or about 54.5 per cent of the average claimed valuation of \$1,160,368.58 for the entire seventeen carriers, yet during the 3-year period, 1924, 1925, and 1926, this carrier, based on the revenue received, handled only about 15 per cent of the total traffic. It appears obvious, and the record shows, that the financial difficulties of the Island Transportation Company are not primarily due to insufficient rates but to an over-abundance of equipment, a large part of which is not entirely suited to the present-day transportation requirements, it consisting principally of barges and towboats not now used to capacity. In the past when the tonnage was handled in relatively large individual consignments the barge and towboat undoubtedly constituted an economical method of operation, but the record discloses that since the advent of the small shipments this is not the most economical way to handle the traffic in the delta regions.

Based on the revenues received during the 3-year period by the four carriers not earning a return of at least 6 per cent, namely, Island Transportation Company, Wood & Seitz, Heringer & Scott, and Wheeler Transportation Company, the tonnage handled via these lines was approximately twenty-eight per cent of the total transported by all seventeen carriers. Here we are confronted with a situation where the necessities of four carriers handling a relatively small portion of the total tonnage on the rivers would result in burdening the public by increasing the rates of other lines handling 72 per cent of the traffic and which the record shows are not entitled to the increases. The fact that the lines transporting the bulk of the traffic realized reasonable returns on their investment throughout a period of years, operating in the same territory as the Island Transportation Com-

P.U.R.1928E.

pany, Wood & Seitz, Heringer & Scott, and the Wheeler Transportation Company, leads me to the conclusion that the present rates are not the entire cause of their poor financial condition.

Complainants' plea for uniform rates, rules and regulations rests upon a desire to prevent the carriers reducing existing rates without authority of the Commission and to establish rules and regulations free from ambiguities so that they may be applied uniformly without misinterpretation. They claim, as previously stated, that where one carrier reduces its rate the others, if they are to secure their share of the tonnage, must of necessity establish rates of the same volume, even though they believe the reduced rates unremunerative. The evidence shows that in the past where a carrier has reduced its rate by proper tariff publication, the others have usually done likewise, but there is no evidence on this record to show that any of the rates when reduced were unduly low or noncompensatory.

The two largest operators of vessels, the California Transportation Company and the Southern Pacific Company's river lines, are now neither complainants nor defendants, although made parties defendant when the proceeding was filed. At the first hearing they were eliminated but the reasons for such action are not clearly set forth in the record.

The Southern Pacific Company operates vessels on regular schedules between San Francisco, Sacramento, and the intermediate points, and the California Transportation Company between San Francisco, Sacramento, Stockton and the intermediate points, and also performs a service with two vessels not on regular schedules but which serve exclusively the delta producing regions. In addition to the competition of these two strong lines, the named complainants and defendants in this proceeding are confronted with the competition of privately owned water carriers, contract and common carrier trucks, and by the railroads, Southern Pacific, Santa Fe, Western Pacific, and San Francisco-Sacramento, which collectively serve Sacramento, Stockton, Antioch, Pittsburg, Avon, Martinez, Port Costa, Benicia, South Vallejo, Petaluma, Oakland, and San Francisco. Complainants contend that certain territory is not competitive with the rail

P.U.R.192SE.

carriers because much of the tonnage is inaccessible to them. The record, however, does not sustain this contention, as approximately 15 per cent of the tonnage handled during the year 1926 moved solely between the points where there is rail competition.

[4] Complainants contend that unless uniform rates are established it will be impossible to prevent the unscrupulous from rebating. Throughout the hearings there was a considerable amount of veiled testimony, principally by the president and secretary of the Bay and River Boat Owners' Association, relating to the practices of some carriers in deviating from their published tariffs and by various devices according shippers preferential and unlawful rates. These witnesses testified they were unwilling to make any specific charges and although intimating they were in possession of the facts contented themselves with general allegations. If it is true that carriers are departing from their published tariffs, and complainants, as they intimate, are in possession of the facts, it is their duty to lay the matter before the Commission. Certainly the establishment of uniform rates will not automatically cure this evil, if such exists, but on the contrary would afford more leeway to the unscrupulous.

[5] There is nothing inherently wrong with the principle of uniform rates, rules and regulations, and indeed in some instances they are imperative. Section 32 of the Public Utilities Act in substance states that when necessary for the preservation of adequate service and when public interest demands, the Commission shall have the power to prescribe the uniform rates, rules, regulations, and practices. This section of the act, broadly interpreted, must apply to uniform rates where there are uniform circumstances and conditions and when the uniform rates can be made to apply to every operator performing a similar service in the territory involved.

[6, 7] It clearly appears to me that in a situation where the transportation services performed are by various methods and are totally different, no beneficial or practical results would be secured and in the end would only restrict defendants from voluntarily changing rates, which may in many cases be entirely justified under changing conditions. The absence of uniform
P.U.R.1028E.

rates as prayed for in this proceeding will not place a burden on complainants, for they now have the means, by use of the provisions of § 63 (b) of the Public Utilities Act, to have suspended and investigated any reductions in rates which they may consider unduly low. Under these provisions of the act the Commission has the power, either upon complaint or upon its own motion, to enter upon a hearing to determine whether or not the reduced rates are reasonable and compensatory.

After careful consideration of all the facts of record I am of the opinion that complainants have not justified the increased rates or the establishment of uniform rates, rules and regulations. The complaint should be dismissed, but without prejudice to any future action these complainants may desire to take.

I recommend the following form of order:

ORDER.

This case having been duly heard and submitted, full investigation of the matters and things involved having been had, and basing this order on the findings of fact and the conclusions contained in the opinion which precedes this order;

It is hereby *ordered*, that Case No. 2319 be and the same is hereby dismissed, without prejudice.

The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Railroad Commission of the State of California.

Decoto, Commissioner: I do not wish to be understood as favorable to an allowance of 5 per cent depreciation in cases of this character. It seems to me that a depreciation of from 2 per cent to $3\frac{1}{2}$ per cent would be ample under these circumstances.

P.U.R.1928E.

CALIFORNIA RAILROAD COMMISSION.**RE SMITH RIVER POWER COMPANY.**

[Application No. 14697.]

RE W. H. McINDOE et al.

[Application No. 14718.]

[Decision No. 19939.]

Security issues — Basis — Going concern value.

1. An issue of securities will not be permitted against an allowance for going concern value, p. 98.

Security issues — Amount — Historical cost.

2. A security issue should be based upon the estimated historical cost of the properties, consideration being given to the depreciation of such properties and the earnings realized from the operation of the properties, p. 98.

[June 26, 1928.]

APPLICATION for a transfer of utilities and authorization of security issues; transfer approved and securities issued authorized in accordance with opinion.

Appearances: C. Romander, for Smith River Power Company; Orrick, Palmer & Dahlquist, by Hillyer Brown, for Public Utilities California Corporation, and for W. H. McIndoe, and James H. Owen.

By the Commission: In Application No. 14718 W. H. McIndoe and James H. Owen ask permission to transfer to the Smith River Power Company, a corporation, all of their right, title, and interest to the water and electric properties operated by said company.

In Application No. 14697, Smith River Power Company asks permission to transfer its business and properties to Public Utilities California Corporation, who asks authority to purchase such properties and issue in payment therefor \$23,200 of common stock.

It is of record that the legal title to the Anthony Water System supplying domestic water in and about the town of Smith River, Del Norte county, was originally owned by Mary Anthony and W. H. McIndoe. Pursuant to an application filed with the Commission it, by Decision No. 10499, dated May 24, 1922, au-P.U.R.1928E.

thorized Mary Anthony to transfer her interest in the water system to James H. Owen. Thereafter James H. Owen transferred his interest to W. B. Ribenack without first having obtained permission from the Commission to make such transfer. By Decision No. 12452, dated August 6, 1923, the Commission authorized W. B. Ribenack to transfer his interest in the properties to the Smith River Power Company, an unincorporated association. Thereafter the association extended the water system and also constructed an electric generating system and began to distribute electric energy. By Decision No. 18818, dated September 19, 1927, the Commission authorized the Smith River Power Company, an association, to sell its properties to the Smith River Power Company, a corporation. In order to perfect the title of Smith River Power Company, a corporation, which now operates all of the properties, applicants asked that the Railroad Commission authorize W. H. McIndoe and James H. Owen to convey such interest as they may have in the properties of the Smith River Power Company, a corporation, to said Smith River Power Company. This transfer will be effected by the execution of a quitclaim deed. No consideration other than what has heretofore been paid will be paid for the properties by the Smith River Power Company, a corporation.

In Application No. 14697 Smith River Power Company, a corporation, asks permission to transfer its properties to the Public Utilities California Corporation. The vendor is engaged in distributing water and electricity to the inhabitants of Smith river and vicinity. The testimony shows that it has 74 water and 81 electric consumers.

There was filed in these proceedings as Exhibit "B" an estimate of the cost of reproducing the properties of Smith River Power Company, and an estimate of the original cost of the properties, prepared by the Loveland Engineers, Incorporated. A summary of the estimate follows:

Item	Reproduction cost		Estimated original cost	
	New	Depreciated	New	sinking fund accumulation
Intangibles	\$3,000.00	\$3,000.00	\$3,000.00	
Electric properties .	19,104.00	18,627.00	19,104.00	\$477.00
Water properties ..	6,248.00	4,709.00	5,806.00	1,160.00
Totals	\$28,352.00	\$26,336.00	\$27,910.00	\$1,637.00
P.U.R.1928E.		7		

The allowance for intangible capital includes \$500 for organization, \$250 for acquiring franchises, \$2,250 for going concern value.

[1, 2] The Commission has heretofore gone on record that it will not permit the issue of securities against an allowance for going concern value. Likewise that the security issue should be based upon the estimated historical cost of the properties, consideration being given to the depreciation of such properties and the earnings realized from the operation of the properties. Deducting the \$2,250 from the \$27,910 leaves a balance of \$25,660. The sinking-fund accumulation, as reported by the Loveland Engineers, is \$1,637 which, deducted from the \$25,660, leaves a balance of \$24,023. The Public Utilities California Corporation asks permission to issue \$23,200 of stock in payment for the properties. Such issue, we feel, is warranted and the order herein will authorize the same.

NEBRASKA STATE RAILWAY COMMISSION.

RE S. Y. A. BUS LINE.

[Application No. 6770.]

Automobiles — Commission jurisdiction — Need of special statute.

The Commission has no authority in the absence of a statute specifically delegating to it power to regulate motor utilities to refuse authority to intrastate operator seeking the same, notwithstanding the fact that existing motor service over the proposed route is adequate and that the proposed service will make both operations unprofitable.

Automobiles — Commission authority — General powers.

Dissent to the effect that the Commission by virtue of its general powers to "regulate" the service and safety of operation of each motor transportation company and by virtue of its constitutional powers to regulate common carriers, has jurisdiction to refuse authority for proposed motor service which will result in a duplication detrimental to public interest, p. 101.

(MILLER, Commissioner, dissents.)

[June 26, 1928.]

P.U.R.1928E.

APPLICATION of a motor carrier for authority to operate within the state of Nebraska; authority granted.

Appearances: George Armand, York, John Riddell, York for applicant; C. T. Wilson, Hebron, Lester Dunn, Lincoln for protestant; Walter V. Huston, Bus Clerk, for the Commission.

By the **Commission:** Application was presented to the Commission April 21, 1928, by the S. Y. A. Bus Line, a motor transportation company owned and operated by George Armand, York, for authority to extend operations to include bus service between York, Nebraska and Belleville, Kansas, and for approval of route and schedule sought to be used in connection with the proposed additional service.

The route and schedule submitted for approval are as follows:

Route

From York, Nebraska to Belleville, Kansas, via Federal Highway No. 81, Nebraska portion of which route is sketched in blue on state highway map attached to original application.

Miles	<i>Schedule.</i>		
	Read Down Southbound A. M.	Stations	Read Up Northbound P. M.
0	7:30 Lv.	York	6:40
	7:50	McCool Jet.	6:20
	8:10	Fairmont	6:05
	8:25	Geneva	5:45
	8:45	Strang	5:25
	9:05	Bruning	5:05
	9:25	Belvidere	4:45
	9:45	Hebron	4:25
	10:10	Chester	4:00
83	10:40	Belleville	3:30

Mileage in Nebraska 69.7

The C. T. Wilson Bus Line, a motor transportation company owned and operated by C. T. Wilson, Hebron, Nebraska, was authorized by order of the Commission issued August 1, 1927, under Application 6812, to furnish bus service over the York-Hebron portion of the route proposed in the application herein. Since the date of issuance of said order, the C. T. Wilson Bus Line has continuously and exclusively furnished motor transportation service between said points. The approved York-Hebron P.U.R.192SE.

schedule upon which said motor transportation company has operated since November 22, 1927, is as follows:

<i>Hebron-York.</i>				
Read Down		Stations	Read Up	
Daily P. M.	Ex. Sun. A. M.		Daily P. M.	Ex. Sun. P. M.
2:20	7:40	Lv.	Hebron	Ar.
2:35	8:00		Belvidere	1:50
2:50	8:20		Bruning	1:30
3:05	8:40		Strang	1:10
3:20	9:00		Geneva	12:50
3:40	9:20		Fairmont	12:30
4:20	9:40		McCool Jct.	12:10
4:40	10:00	Ar.	York	Lv.
				11:00
				6:25

An extension from Hebron to the Kansas border was authorized, and the following schedule, including proposed Kansas extension, was approved by the Commission's order issued to the C. T. Wilson Bus Line, June 23, 1928.

Schedule.			Read Up
Read Down		Stations	P. M.
A. M.			
8:30	Lv.	Hebron	Ar.
9:00	Ar.	Chester	Lv.
9:00	Lv.	Chester	Ar.
9:30	Ar.	Belleville	Lv.
9:30	Lv.	Belleville	Ar.
10:00		Cuba	
10:25		Haddam	
10:50		Morrisville	
11:15		Washington	
11:55		Hanover	
12:35	Ar.	Marysville	Lv.
			2:20

Said C. T. Wilson Bus Line was notified on April 24, 1928 of the application herein and on May 1, 1928 entered formal objection to the establishment by applicant herein of the proposed York-Belleville run. A hearing was accordingly held at the office of the Commission May 23, 1928, to establish the rights of the interested parties. Testimony adduced during said hearing tended to prove that the C. T. Wilson Bus Line, during the pioneering stage of bus operations between York and Hebron, has, without profit, furnished bus service between said points, despite adverse weather and highway conditions; that it has at no time failed to accommodate the traveling public in this territory; that it has at all times, and now is, ready, able, and willing to establish additional service between said points, when the demand for the same seems to warrant it.

P.U.R.1928E.

In the light of such evidence and in consideration of all other facts and data surrounding the case, the Commission is of the opinion and finds as follows:

First: That adequate motor transportation service is now being provided the traveling public between York and Hebron by the C. T. Wilson Bus Line.

Second: That by the establishment of the proposed extension of operations by applicant herein, the patronage of the C. T. Wilson Bus Line would be so materially diminished that the said motor transportation company would be operating at a distinct loss.

Third: That this York-Hebron territory, pioneered by the C. T. Wilson Bus Line under the most unfavorable conditions, served without profit pending a day when highway improvements might repay the effort expended, should not now be invaded by a concern which, the Commission feels, would not only reduce the revenues of the pioneer, but would fail to reap a profit for itself.

Wherefore, in the cause of justice and in the interest of general motor transportation service in Nebraska, the Commission feels that the S. Y. A. Bus Line, applicant herein, should be denied the privilege of establishing the proposed extension of operations to include motor transportation service between York and the Kansas border.

But, the Commission is of the further opinion, that under the present laws of Nebraska, it is vested with no power to issue to motor transportation companies, certificates of convenience and necessity, and does not, under its especially delegated power to "regulate the service and safety of operation of each such motor transportation company in this state" (see § 2, Chap. 150, Session Laws of Nebraska, 1927), possess a prerogative which will permit its denial of approval of the extension of operations as proposed in the application herein of the S. Y. A. Bus Line. The route and schedule set forth in the fifth supplemental application herein, will be, therefore, approved.

Miller, Commissioner, dissenting: I find myself unable to agree with my associates as to the power of the Nebraska State P.U.R.1928E.

Railway Commission to withhold its approval of the bus service set forth in the application. Such service is concededly unnecessary and it must, therefore, be, in the long run, contrary to public interest.

The Constitution provides as follows:

"The powers and duties of such Commission shall include the regulation of rates, service, and general control of common carriers as the legislature may provide by law. But, in the absence of specific legislation, the Commission shall exercise the powers and perform the duties enumerated in this provision." Article IV, § 20.

The Statutes of 1927 relating to the operation of motor busses, Laws of Nebraska for 1927, Chap. 150, page 403 provides as follows:

"The Nebraska State Railway Commission shall have general control of the common carriers mentioned in § 1 hereof and is hereby vested with authority to make reasonable regulations, except the fixing of rates or fares to be charged, governing each motor transportation company in this state; is vested with authority to regulate the service and safety of operation of each such motor transportation company in this state; to require said common carriers to file annual and other reports, containing such information and data as the Commission may require, and to provide uniform accounting systems." (Section 2).

It appears to me that these sections give full authority to the Commission to grant or to withhold its approval, after full hearing, of applications for permission to operate motor busses. The regulation of service and general control cannot be accomplished effectively without the power to control the number of vehicles. As recited in the majority opinion, if new companies may be organized and new service undertaken without limit it is inevitable that such competition will so result as utterly to destroy many of those who have established and built up transportation lines. It will doubtless frequently happen that all of those engaged in such competition will be compelled to suffer great losses and be thrown into bankruptcy. When failure results the service will undoubtedly be unduly reduced, or if maintained, the equipment used will be allowed to deteriorate and in any event the P.U.R.192SE.

public service will suffer. There is no reason in my opinion why the public may not limit the number of vehicles in use because without limitation too many will undertake the business of carrying passengers. The result will be that the service will suffer, as above stated or that, rather than go into bankruptcy, the operators will combine to keep up fares. It would be impossible for the Commission to hold the fares down to a reasonable point. While the first condition above mentioned may not result, the public may be overcharged and probably be compelled to ride in inferior equipment. In any event, the public will pay the cost of the unnecessary operation and it will not get the service that it deserves.

For an extended discussion of the subject see dissenting opinion of Commissioner Hall in the matter of the application of the People's Telephone Company to sell stock, 8 Ann. Rep. Neb. S. R. C. 211, P.U.R.1915D, 160.

Under the majority opinion in this case it is conceded that the application should be denied. I cannot believe that in such case it was contemplated either by the people in adopting the constitutional amendment creating the Commission or by the legislature in the enacting statute above mentioned, that such condition could exist and there be no remedy therefor.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF TEXAS.

HI-BALL TRANSIT COMPANY

v.

RAILROAD COMMISSION OF TEXAS et al.

[No. 3199-457.]

(27 F. (2d) 425.)

Courts — Federal injunction against State Commission — Statutory court.

1. After a hearing by a statutory Federal court of three judges on an application to enjoin a State Commission, jurisdiction may be had by a single Federal judge for a subsequent trial where no final action had been taken by the first tribunal which had granted the intervening P.U.R.192SE.

period for the purpose of permitting the State Commission to reconsider its action, p. 105.

Interstate Commerce — Exclusive Federal jurisdiction.

2. The fundamental law of the Nation, which is the supreme law of the land, vests exclusive jurisdiction over interstate commerce in the national government, p. 105.

Constitutional law — Attempted state regulation — Automobile.

3. State statutes attempting to delegate to State Commissions the discretion to determine, not the use of the state's highways, but the persons by whom such highways may be used, prohibiting their use to some and permitting their use to others, are unconstitutional, p. 105.

Constitutional law — Attempted state regulation — Financial ability.

4. State statutes attempting to delegate to State Commissions the discretion to determine the financial ability of interstate motor carriers are unconstitutional, p. 105.

Courts — Jurisdiction over intrastate commerce — Automobiles.

5. The Federal Court has no jurisdiction to order a State Commission in the intrastate field, p. 107.

Injunction — Question as to operation in good faith.

6. Injunctive relief against a State Commission refusing to authorize interstate motor carriers was denied where there was grave doubt as to whether the carrier was confining its activities strictly to interstate commerce, p. 107.

[June 19, 1928.]

APPLICATION of interstate motor carrier for injunction to restrain interference by a State Commission; dismissed without prejudice.

Appearances: J. M. Hayes, of Oklahoma City, and E. R. Meek, of Dallas, for plaintiff; D. A. Simmons and H. Grady Chandler, Assistant Attorneys General, for defendants.

Atwell, District Judge: This suit was instituted early in March, 1928, by the plaintiff, a copartnership, composed of two gentlemen alleged to reside in the state of California. The bill is rather generally drawn, but alleges, in substance, that the copartnership is operating a line of motor busses for the carriage of passengers, interstate, from California, Arizona, New Mexico, and Texas to a terminus at Dallas, Texas, and from Dallas on into Oklahoma, Missouri, and ultimately to Chicago; that the Railroad Commission of Texas, which is given power by an act of the legislature to grant certificates of "convenience and necessity" to prospective motor common carriers of passengers, acting P.U.R.1928E.

under §§ 3 and 7 of the state law (Acts Tex. 40th Leg. [1927] Chap. 270), refuses to grant a permit to plaintiff, and threatens arrest of plaintiff's drivers in and by the county authorities in Texas in the counties through which it is alleged their automobiles, in the conduct of such interstate passenger business, will of necessity be compelled to pass, and that such state law is unconstitutional.

[1] A preliminary restraining order, a temporary injunction, and a permanent injunction are prayed. The defendants maintain the constitutionality of the law mentioned, and assert it to be their duty and province to supervise, under the police power of the state, the conduct of such business as is contemplated by the plaintiff. At a hearing before three judges, at New Orleans, Circuit Judge Foster, District Judge Dawkins, and the writer, a rule was entered giving the defendant thirty days more in which to consider the application of the plaintiff.

On this day, by agreement of all parties, the case is taken up on the merits for final solution, the defendants presenting an objection to the jurisdiction, on the ground that the hearing before the three judges requires this trial to be before three judges. The Act of 1925 (28 USCA § 380), if read loosely, does seem to leave that impression; but the Supreme Court, in *Smith v. Wilson*, 273 U. S. 388, 71 L. ed. 699, 47 Sup. Ct. Rep. 385, held that it did not so mean, unless the application for an interlocutory injunction had been pressed to a determination; the reason, then, being patent that it would look wrong to permit one judge, upon a final hearing, to undo what three judges had done upon a preliminary hearing.

[2-4] A great deal of testimony has been admitted, including the opinion of the Railroad Commission. This testimony and this opinion clearly evidence the view of the Commission, notwithstanding its disclaimer, in its amended answer, of any authority to grant a "certificate of convenience and necessity" to an interstate carrier, that it has such authority.

Section 3 of the Act of 1927 is as follows:

"It is hereby declared that when existing transportation facilities on any highway in this state do not provide passenger service
P.U.R.1928E.

which the Commission shall deem adequate to provide for public convenience on such highway, then such inadequacy of service shall be considered as creating a condition wherein the public convenience and necessity require the designation of, and provision for, additional service on such highway, and it shall be the duty of the Commission to issue certificate or certificates as herein provided, if, in the opinion of said Commission, the issuance of such certificate will promote the public welfare."

Section 7 of the same act is as follows:

" . . . In determining whether or not a certificate should be issued, the Commission shall give weight and due regard to (1) probable permanence and quality of the service offered by the applicant; (2) the financial ability and responsibility of the applicant and its organization and personnel; (3) the character of vehicles and the character and location of depots or termini proposed to be used; and (4) the experience of the applicant in the transportation of passengers and the character of the bond or insurance proposed to be given to insure the protection of its passengers and the public. . . . "

The first part of § 5 has the following provision:

"No motorbus company shall hereafter regularly operate for the transportation of persons as passengers for compensation or hire over the public highways of this state without first having obtained from the Commission under the provisions of this act a certificate or permit declaring that the public convenience and necessity require such operation."

That such regulation by a state is entirely unconstitutional, when sought to be applied to interstate commerce, is not an open question. Discussion was foreclosed at an early date, because the fundamental law of the nation, which is the supreme law of the land, vests jurisdiction over such commerce in the National Government.

That the motor age has dawned does not change the law, and, beginning with *Buck v. Kuykendall*, 267 U. S. 307, 69 L. ed. 623, P.U.R.1925C, 483, 45 Sup. Ct. Rep. 324, 38 A.L.R. 286, wherein Mr. Justice Brandeis, for the Court, said: "Thus, the provision of the Washington statute is a regulation, not of P.U.R.1928E.

the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the Commerce Clause. It also defeats the purpose of Congress expressed in the legislation giving Federal aid for the construction of interstate highways"—down through *Bush & Sons Co. v. Maloy*, 267 U. S. 317, 69 L. ed. 627, P.U.R.1925C, 488, 45 Sup. Ct. Rep. 326; *Interstate Busses Corp. v. Holyoke Street R. Co.* 273 U. S. 45, 71 L. ed. 530, P.U.R.1927B, 46, 47 Sup. Ct. Rep. 298; *Interstate Busses Corp. v. Blodgett*, — U. S. —, 72 L. ed. —, P.U.R. 1928C, 144, 48 Sup. Ct. Rep. 230; *Clark v. Poor*, 274 U. S. 554, 71 L. ed. 1199, P.U.R.1927D, 346, 47 Sup. Ct. Rep. 702, and *Sprout v. South Bend*, — U. S. —, 72 L. ed. —, 48 Sup. Ct. Rep. 502, which treat of similar cases from the states of Washington, Ohio, Connecticut, Maryland, Massachusetts, and Indiana, there has been a consistent maintenance of the supremacy of the nation over such interstate traffic.

Manifestly the purpose of §§ 3 and 7 of the Texas Act is to allow the Railroad Commission to determine, not the use of the state's highways, but the persons by whom such highways may be used, prohibiting use to some and permitting their use to others, and to determine what facilities are adequate, as well as to determine the financial ability, etc., of the persons so engaged. All such regulations by the state are unconstitutional.

In this country there is no financial test of one's right to engage in business. The poor man has the same right as the rich man. The driver of one car, who maintains a schedule and drives it within the lawful limits, and preserves the proper guaranties in the way of insurance for his passengers, etc., has as much right to enjoy the highways into and through the states in passing from state to state, as does the man with \$1,000,000 and with 1,000 cars. To hold otherwise would be to fix a money rule, which is not lawful.

[5, 6] It has developed, however, during the presentment of the testimony, that grave doubt has been raised as to whether the plaintiff confined its carrying of passengers to those who were traveling interstate. So much doubt is raised by the testi-P.U.R.1928E.

mony that it would be unsafe to grant the relief prayed for. The Railroad Commission has as undoubted authority over interstate business as has the Nation over interstate business. This Court would have no more jurisdiction to order the Commission in the intrastate field than does the Commission have in the other field. See *Sanger v. Lukens* (D. C.) 24 F. (2d) 226.

Because of such situation, the bill will be dismissed without prejudice to again seek relief, if and when the coming of new conditions shall warrant.

WISCONSIN SUPREME COURT.

WILLOW RIVER POWER COMPANY

v.

RAILROAD COMMISSION OF WISCONSIN.

(— Wis. —, 220 N. W. 173.)

Service — Default of payment by previous owner — Installation charges.

1. Current owners of premises to which a utility has constructed its line and stands ready to serve are under no contractual obligation to pay for such installation as a condition of receiving service, notwithstanding a company rule authorizing it to require the cost of extensions to be paid in advance by customers, or the fact that previous owners had defaulted in the payment of notes given therefor, p. 110.

Service — Jurisdiction of Commission — Default by former owner.

2. The Commission has jurisdiction to require a utility to render service notwithstanding the default in the payments for installation of wiring by former owners, and a rule authorizing it to require cost of extension to be paid in advance, p. 110.

[June 18, 1928.]

APPEAL from judgment of circuit county court affirming an order of the Railroad Commission requiring an electric utility to extend service; affirmed.

This action was brought to review an order of the Railroad Commission, made August 24, 1927, P.U.R.1927E, 548, requiring the plaintiff, a public utility, to connect for electric service and serve the premises of the Farmers' Finance Corporation in the village of Hammond and the farm premises of H. E. Binger P.U.R.1928E.

near Roberts. Prior owners of these two premises made contracts with the power company in 1920 and 1921 under the rules of the company then in force authorizing the company to require the cost of the extension of the wires required for such service to be paid for by the customer in advance of such installation. In the two instances here the payments for such extension costs were not made in cash, but notes taken in lieu thereof of \$242.86 and \$450, respectively. Such notes were renewed from time to time, and payments made on one of them, but on August 18, 1923, and November 19, 1924, service was discontinued as to each of such premises because of the default in the paying of such respective notes or renewals. In one instance the service was discontinued with the consent of the then owner of the premises, maker of such contract, and in the other such owner and maker became insolvent. The wires remained on the said premises the same as before, after the discontinuing of such service.

In 1927 the present owners or occupants of said premises made demand that service be renewed by the power company, which demand was refused on the ground that it had the right to insist, under its existing rule and regulation to the effect that, if a customer defaults in the payment of bills or fails to comply with the utility's rules after specific notice has been given, the utility may discontinue service and remove its metering equipment. The Railroad Commission, upon the hearing, made its order directing that service should be furnished without requiring any payment on account of such unpaid obligations of the prior owners, and this action was brought to review such order; and, from the judgment affirming the action of the Railroad Commission, this appeal is taken.

Appearances: Spencer Haven, of Hudson, for appellant; John W. Reynolds, Attorney General, and Suel O. Arnold, Assistant Attorney General, for respondent.

Eschweiler, J.: The utility here insists that the taking of the notes from the parties to the original contract with the utility providing for the payment in advance of the cost for the equipment and installation of the necessary wires for service in such P.U.R.192SE.

territory as was here involved could not be considered as payment, and that such obligation was a continuing one, and that the Railroad Commission was without power to compel the utility to now furnish service to new owners of the same premises, leaving unpaid the amounts due for the original installation of service.

The trial court properly found that there was no express contract agreement between the power company and the former owners that the giving of the notes should be accepted as a payment of the obligations evidenced by such notes, and, there being no express agreement to that effect, the mere giving of such obligations did not, as between the parties, amount in law to a payment or discharge of the obligations. *Wagner v. Old Colony Life Insurance Co.* 170 Wis. 1, 5, 172 N. W. 729. We deem this proposition, however, immaterial here.

[1, 2] The power company did not exercise the option which it had secured to itself of removing the wires and equipment from the premises upon default in the payment, but allowed the same to remain on the respective premises in the same form as before and ready for immediate service.

The utility being in a situation where it can now furnish service to the present owners of the premises without any additional expenditure for equipment, it cannot, as against a present owner of the premises, refuse him service because of unpaid liabilities of a former owner with which the present owners are neither by contract or law charged with responsibility, and for which they have in no wise assumed responsibility. That refusal of such service in a city to a present occupant of premises whose former occupant was delinquent in his obligations cannot be based upon the ground that the obligations of a prior owner or occupant must first be met as a condition precedent to the right of service is not questioned here by appellant, and is well established by the authorities passing on such a question, among which are *Hatch v. Consumers' Co.* 17 Idaho, 204, 104 Pac. 670, 40 L.R.A. (N.S.) 263, with note; cases cited in note in 28 A.L.R. 486, and 13 A.L.R. 349.

We can find no ground upon which a distinction can be made between such a situation and the one here. The company has P.U.R.1928E.

its wires installed and ready for service to the present owner or occupant of these two premises, and they are entitled to present service, and it is within the power and jurisdiction of the Railroad Commission to direct that such service shall be given.

Judgment affirmed.

NORTH DAKOTA SUPREME COURT.

STATE, Doing Business as North Dakota Mill & Elevator Association et al.

v.

GREAT NORTHERN RAILWAY COMPANY et al.

[No. 5394.]

(— N. D. —, 219 N. W. 295.)

Public utilities — Ownership by state — Warehouses.

1. The state-owned mill and elevator, together with the equipment, trackage, and other facilities thereof in Grand Forks, North Dakota, is in law and fact a "public terminal grain elevator and subject to regulation as such," p. 121.

Service — Grain milling and storage — Railroads.

2. "Milling in transit," "stoppage in transit," "cleaning, mixing, and storing in transit," are lawful services which may be required from transportation companies under proper conditions, and are not mere privileges to be granted by transportation companies on their own volition, p. 120.

Service — Duty to serve — Right to compensation — Railroads.

3. Such service [milling, stoppage, cleaning, mixing, and storing grain in transit] cannot be required of transportation companies without adequate compensation therefor, p. 120.

Railroads — Jurisdiction of Commission — Handling grain.

4. The Board of Railroad Commissioners of the state of North Dakota has the power and authority to determine when and where such service [milling, stoppage, cleaning, mixing, and storing grain in transit] shall be rendered, and the duty of determining primarily what is an adequate compensation therefor, p. 121.

Rates — Handling grain — Railroads.

5. The record examined, and it is held, that the decision of the Board of Railroad Commissioners that 1 cent per hundredweight is an adequate compensation for "cleaning, mixing, and storing in transit" service, required of transportation companies at the public terminal grain elevator, is sustained by the evidence taken, p. 122.

[May 21, 1928.]

Headnotes by the COURT.

P.U.R.1928E.

SUIT by the state in the capacity of a mill and elevator association against a railroad to establish rates for the handling of grain, appeal from the State Board of Railroad Commissioners fixing such rates, and appeal from order of district county court affirming order of the Commission; affirmed.

Appearances: O'Hare & Cox, of Bismarck, and R. J. Hagan, of St. Paul, for appellants; H. A. Bronson, of Grand Forks, and T. C. Madden, Assistant Attorney General, for respondents.

Burr, J.: This is an appeal from the judgment of the district court affirming an order of the Board of Railroad Commissioners of the state of North Dakota. In November, 1925, the respondents filed a complaint with the Board of Railroad Commissioners in and for North Dakota, and in this complaint recited the history and development of the "basic industry of the producers of the state of North Dakota, as well as of all citizens of the state directly or indirectly connected therewith," showing the geographic and economic features incident to the marketing and distribution of the agricultural products in relation to the country at large, and setting forth the problems of transportation, cleaning, and other factors in marketing. The complaint then sets forth that the defendant railroads are the chief machinery in the transportation problem, and that under the economic conditions in this state there have grown up fixed terminal markets, in the state; that in addition thereto the legislature of this state, by Chap. 217 of the Session Laws of 1925, enacted: "The state-owned mill and elevator, located at or near the city of Grand Forks, North Dakota, is hereby declared to be a public terminal grain elevator and subject to regulations as such." The complaint further shows that by the same statute the Board of Railroad Commissioners for this state is "authorized, empowered, and required to determine and fix the intrastate rates for the transportation of all grain and grain products moving to or from such public terminal grain elevator within the state of North Dakota." The complaint further alleged that the defendant railroads had already established rates and that the rates so established are unreasonable, and, therefore, the complainants pray that:

P.U.R.1928E.

"The Board of Railroad Commissioners initiate and conduct an investigation and hearing under and pursuant to Chap. 217 of the Laws of North Dakota for the year 1925, and as otherwise provided by law, and that defendants may be severally required to participate in such investigation and hearing and to answer the petition and complaint herein, and that, after due investigation and hearing, such findings and orders be made, and proceedings had that, upon and for the transportation of all grain and grain products moving to or from said terminal or within said terminal, at Grand Forks, intrastate rates will be just, reasonable, and free from discrimination and confiscation in their character, that the said terminal at Grand Forks be recognized, found, and adjudicated to be a terminal in fact, ready, able, and equipped to serve as a terminal for the grain of this state tributary thereto, and that the acts of discrimination, confiscation, unjust, and reasonable rates and practices, of which complaint as hereinbefore set forth, be removed."

Each of the defendants answer. The Great Northern Railroad Company and the Farmers' Grain & Shipping Company deny the allegations of the complaint, except that they admit they are "common carriers engaged in transportation of freight and passengers between points in North Dakota, and that they publish rates on grain and transit and other privileges in the tariffs referred to."

The Minneapolis, St. Paul & Sault Ste. Marie Railway filed its answer, stating:

"That it is a common carrier subject to the Interstate Commerce Act, and also subject to the regulation on intrastate business by the Railroad Commission Act of the state of North Dakota. Further answering, this defendant states that it neither affirms nor denies the other matters contained in said complaint and, therefore, leaves the complainant to its strict proof as to such allegations. This defendant states that it has just and reasonable rates for the transportation of grain and grain products moving within the confines of the state of North Dakota, and denies that its rates on grain and grain products are in any wise unreasonable or discriminatory in any respect whatsoever.
P.U.R.1928E.

Wherefore, having fully answered the complaint herein, this defendant as to it asks that said complaint be dismissed."

In accordance with the complaint and petition, the Board of Railroad Commissioners gave notice of a time and place for the hearing. At the hearing before the Board extraneous parties were permitted to intervene as representatives of commercial interests in the state and of commercial enterprises interested in the subject-matter. A voluminous amount of testimony was taken, and thereafter the Board of Railroad Commissioners made its findings and conclusions setting forth the issues presented to it, as follows:

"First, that under Chap. 217 of the North Dakota Session Laws of 1925, the North Dakota terminal at Grand Forks is made a public terminal.

"Second, that said Chap. 217 vests in the North Dakota Railroad Commission the authority and duty to fix rates with the view of recognizing such terminal as a public terminal market.

"Third, that the North Dakota terminal is in fact a public terminal market, fully able to function as such, and in fact so functioning as far as able so to do.

"Fourth, that such terminal is the only terminal within the state of North Dakota equipped and able to operate as such, and by law recognized as such.

"Fifth, that the whole rate structure, under which all grain moves to market, as now fastened upon North Dakota, gives no recognition to the North Dakota terminal as a terminal, either interstate or intrastate, and permits no rights of transit except in occasional instances through an arbitrary penalty imposed and practically compels all grain to move without the state, and grants to the terminals without the state full transit rights.

"Sixth, that the North Dakota terminal is entitled to function as a terminal on a basis of equality with other terminals.

"Seventh, that the North Dakota terminal is entitled to rights of free transit upon all grain originating in the territory tributary to it.

"Eighth, that the North Dakota terminal is entitled to joint rates over the lines of two or more carriers with free transit such as will place the North Dakota terminal on a basis of equality
P.U.R.192SE.

with other terminals, and free transit at the North Dakota terminal on the continuous distance rates from origin to ultimate destination.

"Ninth, that the North Dakota terminal is entitled to switching charges on a basis of equality with other terminals."

The decision of the Board of Railroad Commissioners considers the evidence produced by both sides. After summarizing the testimony, the findings and conclusions set forth the provisions of Chap. 217 of the Session Laws of 1925. The Board then finds that:

"The evidence in these proceedings clearly shows that more grain is handled by the North Dakota terminal than at any other point in the state. The evidence is also conclusive that the terminal is adequately equipped to clean, mix, blend, store, or market wheat or other grains on a relatively large scale, and that there are no other mills or elevators in North Dakota which compare with those maintained at Grand Forks. By reason of this fact the terminal is able to render a valuable service to the producers and shippers of grain and grain products.

"The physical terminals of the Great Northern and Northern Pacific Railways are located at Minneapolis, St. Paul, and Duluth, at which points the great bulk of North Dakota's grain crop must naturally move to find an ultimate market. Approximately ninety-five per cent of the grain moves to points outside of the state, and there is no question but that the North Dakota terminal is at a rate disadvantage in attempting to compete with the large terminals to the east, but this disadvantage is an interstate matter over which this Commission has no jurisdiction. In the instant case the North Dakota terminal asks that we establish joint line rates no higher than single line rates, with free transit privileges hereinbefore outlined. The testimony and arguments in the terminal case are persuasive, but not conclusive. In Docket No. 1860 this Commission established a reduced schedule of grain rates for single and joint line application. The basis prescribed for determining joint line rates is 85 per cent of the combination of locals, this method being agreed to by the state mill and elevator and the carriers. We are of the opinion that upon this record the present basis of making joint rates to P.U.R.1928E.

and from the North Dakota terminal at Grand Forks is shown to be unreasonable; however, there is no evidence tending to show that the present single line rates are unreasonable. We are further of the opinion that joint line service is as a rule more expensive than single line service, and that in this case an arbitrary charge should be made to cover such additional expense involved in joint line service.

"As previously shown, the single line scale of rates prescribed by us in Case No. 1860 was for single line application between all points in the state, and does not include a charge for accessory services, such as stopping for cleaning, mill-mixing, blending, or storing, performed by the carriers. We are of the opinion that a rate between two points made high enough to include compensation for the service involved in permitting transit operations is too high for the line haul service of transporting the shipment from origin to destination.

"If a line haul rate is made high enough to permit so-called free transit privileges, the charge for the transit service is paid by all shippers, whether or not they avail themselves of the transit privilege. It is our opinion that the line haul rate itself should cover only the line haul and two terminal services, one at origin and one at destination, and that accessory services in addition to the line haul should be charged for separately and be paid for by the party receiving the service. To hold otherwise would, in our opinion, result in placing an undue burden upon other shippers.

"The present switching charge of \$6.30 per car from the local elevator to the state mill or elevator is attacked by the North Dakota terminal as unreasonable, and they argue that the charge should not exceed \$2.25 per car. The Great Northern Railway Company answers that this charge is the same as the intrastate plant switching charge generally in effect on the Great Northern Railway, with a few exceptions. There is no evidence in the record tending to show the cost of furnishing this service. It appears to be a blanket rate covering switching services ranging from those performed in the instant case up to destinations of several miles. On the record before us, we are of the opinion that a charge of \$6.30 per car for switching a distance of some P.U.R.1928E.

180 feet to one-half mile is unreasonable in itself, and that the charge should not exceed \$4 per car."

On these findings the Board concluded, as follows:

"The Commission, having carefully considered all of the testimony in these proceedings, the arguments adduced, and the representations made, and being fully advised in the premises, is of the opinion and finds:

"1. That the North Dakota terminal is by law declared to be a public terminal and public terminal market; that the evidence shows that the terminal is adequately equipped to function, and is functioning, as a terminal in fact in the handling, marketing, cleaning, mill-mixing, blending, and storing of wheat and other coarse grains, rendering a valuable service to the producers and shippers of grain and grain products.

"2. That from and after October 1, 1926, joint rates on grain and grain products applicable intrastate between the North Dakota terminal at Grand Forks, North Dakota, and all points on the Great Northern, Northern Pacific, and Soo Line Railways in North Dakota, on and north of the main line of the Northern Pacific, Fargo to Beach, inclusive, also between all points in the territory just described, when movement is through or via the North Dakota terminal at Grand Forks, will be unreasonable to the extent that they exceed, or may exceed, the single line rates by more than 1½ cents per 100 lbs.

"3. That from and after October 1, 1926, just and reasonable transit privileges shall include, between all points in the territory last above described, cleaning, mixing, storing, or stopping in transit of all grain at the North Dakota terminal at Grand Forks, North Dakota, at a charge of 1 cent per 100 pounds and/or with a further milling in transit privilege at any point between Grand Forks and ultimate destination at a charge of 1½ cents per 100 pounds, in addition to the continuous mileage rate, origin to destination via the North Dakota terminal at Grand Forks, and the second transit station.

"4. That from and after October 1, 1926, the intraplant switching charges on grain and grain products in and within the yards of the state mill or the North Dakota terminal shall not exceed \$4 per car.

P.U.R.1928E.

"5. That Case No. 2398, the Fargo case, and Case No. 2406, the Bismarck case, should be dismissed without prejudice to any proceedings which may be had under Case No. 2255, now pending.

"An order in accordance with these findings will be entered."

The order made by the Board of Railroad Commissioners, omitting the formal portions, is as follows:

"That from and after October 1, 1926, joint rates on grain and grain products applicable intrastate between the North Dakota terminal at Grand Forks, North Dakota, and all points on the Great Northern, Northern Pacific, and Soo Line Railways in North Dakota, on and north of the main line of the Northern Pacific, Fargo to Beach, inclusive, also between all points in the territory just described, when movement is through or via the North Dakota terminal at Grand Forks, will be unreasonable to the extent that they exceed, or may exceed, the single line rates by more than $1\frac{1}{2}$ cents per 100 pounds. That from and after October 1, 1926, just and reasonable transit privileges shall include, between all points in the territory last above described, cleaning, mixing, storing, or stopping in transit of all grain at the North Dakota terminal at Grand Forks, North Dakota, at a charge of 1 cent per 100 pounds, and/or with a further milling-in-transit privilege at any point between Grand Forks and ultimate destination at a charge of $1\frac{1}{2}$ cents per 100 pounds, in addition to the continuous mileage rate, origin to destination via the North Dakota terminal at Grand Forks and the second transit station. That from and after October 1, 1926, the intraplant switching charges on grain and grain products in and within the yards of the state mill or the North Dakota terminal shall not exceed \$4 per car. It is further ordered that Case No. 2398, referred to in the report as the Fargo case, and Case No. 2406, referred to in the report as the Bismarck case, be and the same are hereby dismissed without prejudice to any proceedings which may be had under Case No. 2255, now pending."

From this order the defendants appealed to the District Court. On January 20, 1927, the District Court affirmed the order, and it is from this order of the District Court the defendants appeal to this court.

P.U.R.1928E.

The specifications of error set forth by defendants are as follows:

"(1) That the court erred in failing and refusing to find that the order of the North Dakota Board of Railroad Commissioners appealed from went beyond the issues framed by the complaint and answer in requiring that transit be given at the state terminal at Grand Forks at a charge in addition to the line haul rate of 1 cent per hundredweight.

"(2) That the court erred in failing and refusing to find that there is no evidence upon which the same Commission could lawfully base its said order requiring that transit be given at the state terminal at Grand Forks at a charge of 1 cent per hundred-weight.

"(3) That the court erred in failing and refusing to find that the said Commission's findings of fact do not support their conclusion that the carriers be required to give transit at the state terminal at Grand Forks at a charge of 1 cent per hundred-weight.

"(4) That the court erred in failing and refusing to find that the said order of the Commission results in unlawful discrimination against and a burden upon interstate commerce.

"(5) That the court erred in failing and refusing to find that in requiring joint line rates to, from, and through the said state terminal to be made the continuous mileage scale, plus 1½ cents per hundredweight, the Commission predicated its action upon a misconstruction of Chap. 217, Laws of 1925, relating to public terminal grain elevators.

"(6) That the court erred in failing and refusing to find that the portions of the said Commission's order appealed from are unlawful, are based on a mistake of law, and, having regard to the interest of both the public and the carriers, are so arbitrary as to be beyond the exercise of a reasonable discretion and judgment.

"(7) The court erred in ordering judgment entered in favor of the complainants and respondents and against the defendants and appellants."

The District Court heard the appeal entirely on the record made before the Commission, and did not see nor hear the wit-

P.U.R.1928E.

nesses. This was in harmony with the provisions of § 4609c35 of the Supplement, which requires the District Court to inquire into and determine the lawfulness of the decision or final order of the Board of Railroad Commissioners "on the record of the Commissioners as certified to by it." It is apparent, therefore, the correctness of the order of the District Court is to be determined from a review of the testimony taken by the Board of Railroad Commissioners. On appeal from the decision of the District Court, "the record and testimony and exhibits certified to by the Commissioners, and filed in the District Court, with a transcript of the proceedings in the District Court, shall constitute the record on appeal to the Supreme Court." The case, therefore, is before us on the record made by the Board of Railroad Commissioners, and primarily we are required to determine "the lawfulness" of the order appealed from. The "lawfulness" of the order is not confined to the purely procedural parts. The mere fact that the Board of Railroad Commissioners had jurisdiction of the matter does not in itself make its order therein lawful. The term "lawfulness" means more than conformity to legal mechanism. It means, not only did the Board have jurisdiction to make and render an order in the matter, but that the order it did make was in conformity with the law of the case. This includes the deductions drawn from the testimony and the order based upon these conclusions. It is in this sense that the "lawfulness" of the order is attacked. No question is raised as to the notice given, sufficiency of the time allowed, opportunity to present testimony, or to the character or quality of the hearing; but appellants do say that the order is an unreasonable one in the light of the issues framed and testimony presented, and, therefore, is an unreasonable order.

[2, 3] The milling transit had been given by the defendants before the filing of the complaint, but not the transit service for cleaning, mixing, storing, etc. This action, therefore, involves the two propositions: Should the Board of Railroad Commissioners require the railroads to give this transit service for cleaning, mixing, etc.; and, if so, what charge should the railroads be allowed to make for the service? It is conceded that the public may prescribe conditions under which lawful business affected
P.U.R.1928E.

with a public interest, such as that of common carriers, shall operate (see Greeley Transp. Co. v. People, 79 Colo. 307, P.U.R. 1926D, 433, 245 Pac. 720), and the custom and usages of the defendant roads are subject to lawful regulations (see State ex rel. Burr v. Jacksonville Terminal Co. 90 Fla. 721, P.U.R. 1926C, 115, 106 So. 576). It is not a question of whether the roads will grant the privileges at the terminal; it is matter of service, and, therefore, the railroads are concerned only so far as they are required to render the service, and then only as to the cost of the service required and a reasonable profit therefor, except they cannot be compelled to violate law or lawful regulations.

[1] The question of whether the "state-owned mill and elevator" should be considered a "public terminal grain elevator" is not in issue in this case, though arguments were made as to discrimination against other places of similar business. The evidence shows clearly that independent of the statute this state-owned mill and elevator is in fact a public terminal grain elevator, as the term is understood in the grain business. In addition thereto, the statute so declares it to be and considers it as such for the agricultural industry of this state. The fact that this "terminal" does not include the whole of the city of Grand Forks is immaterial. A "terminal," in the sense employed, is not so much the city in which it is located as it is the established facilities within that city which are used for the terminal business. Hence all of these objections to place and locality are not involved in this suit.

[4] The appellants say that "the issues before the Commission were framed by the complaint and the answer, "and because the complaint asks for free transit privilege for cleaning, mixing, storing, and stoppage in transit; therefore the Board was limited in its inquiry to whether this transit privilege should be given free, and could not determine what is a reasonable charge for the privilege and require the service; or, as they say in their brief:

"The issue before the Commission was whether the transit privilege should be given free or not at all. It was not an issue
P.U.R.1928E.

before the Commission as to whether the transit should be given at a charge."

We cannot agree with this view. The issues framed show that the rates charged for transportation are already considered in fixing the charges for such service as is now rendered. The fact that the complainants asked that because of these transportation charges now in force and effect this terminal service be furnished free does not say the Board is governed by the prayer. Independent of any complaint, the Board had the right to institute proceedings itself "to determine and fix the intrastate rates for the transportation of all grain and grain products, moving to or from such public terminal grain elevator within the state of North Dakota." The whole matter was before the Board for consideration. It had the right to determine whether such transit service should be given, and, if so, what rate should be charged therefor, or whether under existing intrastate transportation rates the service be free; hence there was no error on the part of the Board in this respect.

[5] The next point raised by the defendants is, "There is no evidence whatsoever in the record upon which the Commission could base a finding that 1 cent per hundredweight is a reasonable charge for giving transit." We cannot agree with this view of the record. The record shows that this terminal has now in operation four miles of trackage, costing \$73,000, paid for and maintained by the state of North Dakota, and used by the defendants free of charge. It is clear, so far as this trackage is concerned, there is no cost to the defendants, and, therefore, this can be taken into consideration in determining the reasonable charge for the service. Again, the evidence shows that the facilities for handling grain at this public terminal now, when you consider the size of the city, the amount of general traffic, the congestion or lack of congestion, and all other features considered in determining cost, are superior to those in many other terminals where the railroads charge only 1½ cents for this transit service; that the roads can handle more cars in less time, at less cost, for less distance, and with less time for inspection; that 75 per cent of the cars at the terminal are unloaded, etc., in 48 hours, as compared with 7 days at Minneapolis and 4 or P.U.R.1928E.

5 days at Duluth, and that the roads grant this transit service now in interstate traffic for $1\frac{1}{2}$ cents. The evidence further shows that the defendants now charge but $1\frac{1}{2}$ cents for milling transit, having charged $2\frac{1}{2}$ cents previously, and that the time required for such service is greater than for transit service in cleaning, storing, and mixing grains.

The undisputed testimony shows that for some time prior to the commencement of this action there has been a terminal grain exchange operated at Grand Forks handling about 2,500,000 bushels of wheat in the same manner and for the same purpose as at Minneapolis, and that this terminal could handle 25,000,-000 bushels of wheat in a season; that it is the "natural diverting place" for other markets such as Duluth or Minneapolis, and that it "is a common, everyday experience" for shippers, after cleaning and testing, to ship cars to either of those markets or to sell locally; that most of the cars of wheat originating in North Dakota, and destined for Minneapolis or Duluth and passing through Grand Forks, are stopped there for Federal inspection; that this terminal can today make every kind of mill mix "as close as anybody in the world," that the capacity of the state mill is 18,000 bushels of wheat per day, and the terminal can unload 9 cars per hour, can load 12 cars per hour, can clean 6,000 bushels per hour, can mill mix 1,200 bushels per hour, and can dry 2,000 bushels per hour to the extent of 2 or 3 per cent of the moisture; that the switching charges are \$6.30 per car as compared to \$2.25 at other terminals for greater distances; that 68,000,000 bushels of wheat of the 1925 crop out of a total production of 113,000,000 in North Dakota "was produced in territory claimed to be tributary to this terminal." The complainants also furnished proof to the effect that the Twin City terminals are expensive and their switching operations more expensive than at Grand Forks. On the part of the defendants, it was shown that cleaning and storing in transit of grain originating in North Dakota was permitted at Grand Forks at a charge of $1\frac{1}{2}$ cents per hundredweight when the grain was destined to eastward terminals; that this charge had been $2\frac{1}{2}$ cents, but was reduced to $1\frac{1}{2}$ cents; that though service is identical in quality at different points there may be differences in the ex-

P.U.R.1928E.

pense of rendering the service at these different points; that there is more expense for cleaning in transit at Grand Forks than for a straight shipping car though the service be the same; that the switching charge at Grand Forks in connection with the line haul service is \$3.80, but a car switched to the terminal elevator has 48 hours free time for which the road has to pay other roads \$1 per day for the use of their cars, and \$1 per day does not pay for the use of its own idle car. The defendants also furnish proof that the single line wheat scale in North Dakota "is considerably lower than our interstate wheat scale." On the part of the complainants, testimony was introduced showing that for certain service and distances in Minnesota the railroad charge was $22\frac{1}{2}$ cents; whereas in North Dakota it would be $26\frac{1}{2}$ cents for the same service and distance even if complainants' request were granted. All these are factors to be taken into consideration in determining whether the rate allowed is a reasonable one, and are shown by the record. Consequently this second error complained of is untenable. Further, it may be stated that the Board fixed switching charges at \$4 a car in addition, and evidently this charge is satisfactory to the defendants, as they did not appeal therefrom.

The third error complained of in the brief is that the rate fixed is not a "reasonable transit charge." It must be observed that the "lawfulness" of the order made by the Board in this respect must be determined from the evidence introduced, and, while a fair and impartial consideration of such evidence may lead to differences of opinion as to the reasonableness of the rate fixed, and while this court "must exercise its own independent judgment upon such facts and the law applicable thereto," yet this court will give "whatever weight to which they may be entitled, if any, to the findings of the Commissioners upon disputed questions of fact, the determination of which involves the credibility of witnesses who testified orally before the Commissioners." See State ex rel. Hughes v. Milholland, 50 N. D. 184, 201, 195 N. W. 292. This does not mean this court will necessarily substitute its opinion for the opinion of the Board, if the opinion and determination of the Board on the testimony given orally is a reasonable one, even though some other reasonable conclu-

P.U.R.1928E.

sions could have been deduced from the same set of facts. While we exercise our own independent judgment, this judgment must necessarily be influenced to some extent by the judgment of the Board, in a matter primarily before it, and of which it has such special facilities for judging of which we are denied.

We have already alluded to some factors which are taken into consideration in determining what is the reasonable rate. There is another fact which the board considered, and it must not be overlooked. "The record discloses that the time this case was heard before the Commission, the North Dakota terminal had free transit on Montana grain destined to Minneapolis or beyond, and also free transit on North Dakota grain destined to Chicago or Chicago rate points. The record also discloses that for purposes of inspecting grain on the inspection tracks of appellants in their yards or in the switching yards owned by the state, the switching movement of setting out the cars or moving the cars to the North Dakota terminal is done without charge and is included as a part of the rate now charged." This transit charge is for service rendered after the shipment of grain has reached Grand Forks and over terminal facilities—not expensive ones maintained by the carriers like the ones at Duluth or Minneapolis. The transportation rates in force and effect in the state of North Dakota must be considered. It is the claim of the complainants that transportation rates in North Dakota are greater than the rates charged for the same service in Minnesota. Complainants say that "the single line class rates for North Dakota are high;" that the record also shows that this class of transit service furnished at such terminals as Minneapolis and Duluth is free, for at Minneapolis a car of wheat "can be cleaned, mixed, stored, or milled there without any transit penalty of any kind being assessed." Of course we must consider the factor that the roads may be said to terminate there, and, being at a connecting point, need not care just where the car is stopped. Nevertheless, the element of delay and consequent loss of service of the car must be considered. All this service rendered therein has been taken into consideration in fixing the transportation rates, and even thereafter the transportation rate is less than in North Dakota. The complainants say:

P.U.R.192SE.

"Indeed the findings of the Commission concerning the reasonableness of 1 cent are amply sustained. In our opinion further this Commission might well have found that for such service based on the existing single line rates, the transit should be free just the same as it is free at Minneapolis or Duluth."

Defendants in their brief say the "single line rate is not attacked by the complainants in this proceeding." This rate is $1\frac{1}{2}$ cents per hundredweight from Minot to Grand Forks, and $2\frac{1}{2}$ cents per hundredweight from Minot to Fargo. The rate where the shipment "involves a joint line haul" is "85 per cent of the sum of the single line rates to and from interchange point." These are the rates which are established and in force, and which the Board took into consideration in determining what rate it would set as a reasonable fee for the transit service to be furnished at the terminal. The record shows that the rates in Minnesota are less, with free transit service at the terminals in Minnesota. It is true many factors must be considered in determining whether the transportation rates in effect now are sufficient to justify a transit service of 1 cent instead of $1\frac{1}{2}$ cents. The amount of business transacted, sparseness of population, difficulties of transportation, and all such elements must be considered; but we must assume that the rates now established are fair. The amount to be charged for transportation service may vary with changing time and conditions, and the Board could well believe the rates charged now are sufficiently high so that it would be better to leave them as they are and have a lower transit fee rather than to undertake to lower the transportation rates and maintain the present transit fee.

Another factor to be taken into consideration is that today the defendants charge only $1\frac{1}{2}$ cents for a milling transit service when such service takes more time than service in cleaning, storing, and mixing grains. If the rate of $1\frac{1}{2}$ cents voluntarily made by the defendants for milling transit service be a fair and reasonable charge, and we have no reason to believe they are charging less than a reasonable rate, then the Board is justified in believing from the evidence that a 1-cent charge for the transit service desired is a reasonable rate. We cannot say the Board erred in this respect.

P.U.R.192SE.

The next point raised by the defendants is that "the order requiring the transit at 1 cent per hundredweight is unlawful in that it results in an unlawful discrimination against interstate commerce." It is true that if the shipments originate in the state and terminate in Minnesota, so they are interstate shipments, the transit fee fixed by the Interstate Commerce Commission controls, whereas "if the shipments originate in and terminate in this state and move through the Grand Forks terminal so that a transit service is required, the rate fixed by the Board of Railroad Commissioners for this intrastate shipment would be lower; but before it can be said that the rate "is a discrimination against interstate commerce," the evidence must clearly and distinctly point it out. Defendants point to the action of the Interstate Commerce Commission in ordering the increase in North Dakota on intrastate rates on coal to correspond with increases made in the interstate rates, as shown by the Case of North Dakota Fares and Charges, 61 Inters. Com. Rep. 504. It must be remembered, however, that this is dealing with transportation rates. The one at issue is dealing with an incidental service on a rate now conceded higher than the rate charged for the same service in Minnesota. Because rates may differ in amount does not say it is a discrimination against interstate commerce. "Discrimination" is a net result of all the factors under consideration. Even if the Interstate Commerce Commission should fix a transit fee of $1\frac{1}{2}$ cents per hundredweight for cleaning and transit privileges at the terminal on shipments from east of Grand Forks, it would not necessarily mean that the rate fixed by the North Dakota Board is discriminatory, for there are factors incident to shipments from the east which are not present in state shipments from west of Grand Forks. Hence we do not consider the fee fixed by the Board is a discrimination against interstate commerce, any more than lowering intrastate transportation rates if they should be lowered. At times all such rates must be subject to readjustment.

The last point raised by the appellants is to the effect that the "requirement of the order that joint line rates to, from, and through the state terminal be made the single line rates plus $1\frac{1}{2}$ cents per hundredweight is unlawful," in this that there would be P.U.R.1928E.

unjust discrimination against other milling companies in Grand Forks; that these other milling companies "would have to pay a higher joint rate than the state mill for a shipment of grain or flour moving between identically the same points." This specification overlooks several factors. The evidence shows that not only the state mill but other mills in Grand Forks have today transit for milling service. It is not the state mill which is the terminal; it is everything connected therewith at Grand Forks. When we speak of Duluth or Minneapolis as being terminals we do not understand that it is every street and alley and portion of the city, but that portion where the facilities, the equipment, the mills and elevators, are, without requiring them to be congregated in any special section. There is nothing to indicate that other mills in Grand Forks cannot avail themselves of the same privileges and service, or that they would be shut out under this order. No such mill and elevator is complaining, nor is there any indication that what is reasonable for this terminal is unreasonable for any other mill or elevator in the city. The method used by the Board in computing the rates, which appellants say is unlawful discrimination against other shippers, is the method used by the Interstate Commerce Commission itself on other commodities.

The appellants cite many cases to illustrate the law which the defendants say controls this case. For example, the case of State v. Great Northern R. Co. 130 Minn. 57, P.U.R.1915D, 467, 470, 153 N. W. 247, Ann. Cas. 1917B, 1201, to show that the order of the Board should be vacated as unreasonable:

"The order may be vacated as unreasonable if it is contrary to some provision of the Federal or state Constitution or laws, or if it is beyond the power granted to the Commission, or if it is based on some mistake of law, or if there is no evidence to support it, or if, having regard to the interest of both the public and the carrier, it is so arbitrary as to be beyond the exercise of a reasonable discretion and judgment."

And to the same effect the case of United States v. Abilene & S. R. Co. 265 U. S. 274, 68 L. ed. 1016, 44 Sup. Ct. Rep. 565, to the effect that "a finding without evidence is beyond the power P.U.R.1928E.

of the Commission," and the case of Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 56 L. ed. 308, 32 Sup. Ct. Rep. 108, to show that the Board's order cannot be supported by "a mere scintilla of proof." The case of Southern R. Co. v. St. Louis Hay & Grain Co. 214 U. S. 297, 53 L. ed. 1004, 29 Sup. Ct. Rep. 678, is cited to show that a railway carrier is entitled to some compensation in addition to the actual costs involved in taking loaded cars in transit to the shipper's warehouses—for unloading, inspection, and reloading, etc.

Many other cases are cited as authority for various positions taken by defendants. This case is not so much a matter of construction of law as it is a question of fact. It is conceded that the Board has the general jurisdiction to fix a reasonable transit fee for the service demanded; therefore it became a question of whether the rate fixed by the Board is a reasonable one under the testimony introduced, and for the determination of this we consider the lawfulness of the order made. As said by the supreme court of South Dakota in the case of Chicago, M. & St. P. R. Co. v. Railroad Commissioners, 47 S. D. 395, 199 N. W. 453, stoppage in transit is a right enumerated in the Interstate Commerce Commission Act (49 USCA § 1 et seq.; U. S. Comp. St. § 8563 et seq.), as a service to which the shippers are entitled, and is not a mere privilege, and the State Railroad Commission is empowered to make an order requiring railroad companies to establish such a right. This is conceded by the defendants in principle, but denied as in issue herein. If the Board may determine a rate in this case, then the whole issue is one of fact. The complainants ask for two matters of relief. They say the state mill and elevator at Grand Forks with its facilities and equipment is in fact and by law a public terminal, and ask the Board, first, require the defendant to grant stoppage in transit for cleaning, mixing, etc., of grain, and second, under existing transportation rates require this service free, or fix a reasonable rate therefor. The defendants have no right to complain if they get an adequate return for the service rendered. The Board of Railroad Commissioners, of course, gave careful attention to the whole matter, and determined that this rate fixed is an adequate one. It does not appear to be satisfactory to the defendants; but we are not

prepared to say the defendants have shown it to be inadequate when all factors are taken into consideration.

The judgment of the lower court is affirmed.

Birdzell, C. J., and Burke, Christianson, and Nuessle, JJ., concur.

Rehearing denied May 21, 1928.

OHIO SUPREME COURT.

MINERVA-CANTON TRANSIT COMPANY

v.

PUBLIC UTILITIES COMMISSION OF OHIO.

[No. 21048.]

(— Ohio St. —, 162 N. E. 34.)

Certificates of convenience and necessity — Revocation — Commission jurisdiction.

1. The Public Utilities Commission is authorized by law, "for a good cause," to revoke a certificate of public convenience and necessity theretofore issued by it to any motor transportation company, p. 131.

Certificates of convenience and necessity — Revocation — Duty to observe regulations.

2. The failure of a motor transportation company to comply with the provisions of law or the rules and regulations prescribed by the Public Utilities Commission for the safety of the traveling public warrants the revocation of its certificate of public convenience and necessity, p. 132.

[May 23, 1928.]

Headnotes by the COURT.

ERROR by a motor bus company to review order of Public Utilities Commission revoking certificate; order of Commission affirmed.

Appearances: George T. Poor and Walter W. Thomen, both of Columbus, for plaintiff in error; Edward C. Turner, Attorney General, and A. M. Calland, of Columbus, for defendant in error.

Matthias, J.: This is a proceeding in error for review of P.U.R.1928E.

an order of the Public Utilities Commission, wherein, upon complaint, and after hearing the Commission revoked the certificate theretofore issued to the Minerva-Canton Transit Company, authorizing it to operate a motorbus line over a triangular route between Canton and Minerva.

Numerous instances of violation of the motor bus law (Gen. Code, § 614—84 et seq.) and the rules and regulations of the Commission were alleged in the complaint as grounds for the revocation of said certificate.

The Commission found that the portion of the route extending from Minerva to Salineville, which had been granted as an extension to the route for which certificate had been originally granted, had never been operated; that the company had on several occasions materially changed its equipment without applying to, or procuring the consent of, the Commission, and had failed to pay taxes upon the equipment as required by law; that equipment dedicated to said route was at various times operated on special trips; and that practically all the time during which it has held its certificate the company has failed to have on file insurance as required by law. During two periods the line was operated by receivers appointed by the courts, and the Commission announced that it had difficulty in ascertaining what vehicles were utilized by the company in the operation of its route under such certificate because of the instability of the management of the company.

The record contains evidence which amply sustains the finding of the Commission and warrants its action in revoking the company's certificate. This is particularly true with reference to the failure of the company to comply with the requirements to carry insurance on all busses in use and have the policies covering same on file with the Commission, as required by law.

[1] Broad powers are conferred upon the Commission by the Motor Transportation Act (Gen. Code, § 614—84 et seq.) in order that the public convenience and necessity may be met by adequate transportation facilities. Like power and authority have been conferred upon the Commission to supervise and regulate the service and require and enforce conformance to the law, and to its own rules prescribed under authority of law, for P.U.R.1928E.

the purpose of protecting and safeguarding the interests of the public.

[2] The default of the company in respect to insurance covered a considerable period of time, and is inexcusable. It was not only in disregard of the rules and regulations of the Commission, but in direct violation of the law. Section 614—99, General Code. Power, full and complete, is conferred upon the Commission to revoke any certificate upon good cause, after prescribed notice and an opportunity to be heard. It is not contended, and, of course, could not well be urged, that failure to comply with such requirement, which is exacted as a condition precedent to the issuance of any certificate of convenience and necessity, is not a good cause for the revocation of the certificate by the Commission. It is complained that such punishment is too drastic, because it appears that the company under present management is complying with the law and the rules and regulations prescribed thereunder. The provisions of law as well as the regulations of the Commission designed for the safety of the traveling public should be enforced by the Commission. It is well that motor transportation companies understand that compliance with such laws and regulations will be required and enforced. The order of the Commission is lawful and reasonable, and is affirmed.

Order affirmed.

Marshall, C. J., and Day, Allen, Kinkade, Robinson, and Jones, JJ., concur.

Note.—Certificates of convenience and necessity.

- I. When certificate is required, 133.
- II. Operation prior to regulation, 133.
- III. Consent of local authorities, 134.
- IV. Reasons for granting or refusing:
 - a. In general, 134.
 - b. Applicant's personal qualifications, 135.
- V. Evidence of necessity, 136.
- VI. Preferences between applicants, 136.
- VII. Conditions, 137.
- VIII. Sales, transfers, and assignments, 137.
- IX. Revocation and amendment, 137.
- X. Procedure, 139.

I. When certificate is required.

A certificate to haul specific commodities by auto truck on demand over specified routes was granted where such operations had been conducted for some years, were increasing in volume, and by reason of the great number of trips being made over regular routes and between fixed termini, came clearly within the statutory provisions requiring a certificate for continuance, the applicant having sought to place its operations under the Commission's regulatory authority at a time when it was doubtful if a certificate was required for such operation. *Re Asbury Truck Co. (Cal.) Decision No. 19067, Application No. 10148, Dec. 1, 1927.*

In *Klinkenstein v. Third Avenue R. Co.* 246 N. Y. 327, 158 N. E. 886, Nov. 22, 1927, the New York court of appeals held that the illegality resulting from a failure to obtain a certificate of convenience and necessity consists, not in the operation and the use of a bus upon the streets, but only in the actual carriage of passengers for hire, and that, therefore, there was no connection between the failure to obtain permission to carry passengers for hire and a collision due to the negligence of a street railway motorman.

II. Operation prior to regulation.

An automotive transportation company operating in good faith as a common carrier between specified termini on the effective date of Chap. 213, Statutes 1917 relating to regulation of motor carriers, was held to have thereby obtained a right to continue such operations after the effective date of the act without certification from the Commission. Such a company was held not to have forfeited or abandoned such right because of failure to file tariffs, rules, and regulations, within a reasonable time thereafter where the operator had been advised by a letter from the Commission that it would not be called upon to file such a tariff. *Re J. B. Peckham Co. (Cal.) Decision No. 19152, Application No. 12519, Case No. 2338, Dec. 23, 1927.*

In *Re Baird*, Case No. 5408, March 10, 1928, the Missouri Commission, in granting a certificate for motor bus operation, said: "The applicant was operating over this route on and before December 1, 1926, and according to all the evidence in this case, has been giving regular and dependable service since that date. Applicant, therefore, comes under the provisions of § 11 of the Motor Bus Law, and, wanting evidence to the contrary, is entitled to a certificate of convenience and necessity. The Commission is of the opinion that the applicant is financially able to continue the operation of this bus line, and believes that the continued operation of the same as proposed will give satisfactory and dependable service."

In *Re Washington-Union-St. Louis Bus Co.* Case No. 5423, March P.U.R.1928E.

6, 1928, the Missouri Commission granted a certificate of convenience and necessity to an operator who had been operating on and before December 1, 1926, the effective date of the Motor Bus Law, where the testimony showed that with the exception of a time when the road was impassable owing to no fault of the applicant, the service had been regular and dependable.

III. Consent of local authorities.

The California Commission, in *Re McGeoghegan*, Decision No. 19312, Application No. 14216, Feb. 6, 1928, decided that when streets or roads in which pipe lines are installed have not yet been dedicated to public use, no franchise or other permit from the county authorities is necessary for the purpose of an application for a certificate to operate a water system.

The Illinois Commission, in *Central N. W. Business Men's Asso. v. Chicago Surface Lines*, No. 17741, Jan. 26, 1928, held that its concern under the law was with the single question of the adequacy of existing transportation facilities in the territory involved in an application for a certificate. Concerning the consent of other governmental bodies to its order, the Commission stated: "Undoubtedly there are certain contract relations between the city and respondent which might concern or be affected by the establishment of the auxiliary motor bus operation applied for. But this, and the further or related question as to whether authority must be obtained from the city before such service can be lawfully or effectively installed, this Commission does not assume to determine."

IV. Reasons for granting or refusing.

a. In general.

Authorization was granted to establish an automotive passenger service not expected to be profitable where the applicant proposed to assume all losses in operation and did not expect a compensatory adjustment of rates, but desired to establish service to a particular hotel. *Re Flintridge Motor Co. (Cal.)* Decision No. 19291, Application No. 14252, Jan. 23, 1928.

The Colorado Commission, in *Re Diehl*, Application Nos. 605, 948, Decision No. 1569, Feb. 2, 1928, hesitated in granting a certificate of convenience and necessity to two applicants operating motor carriers where there was some question of their financial soundness and of their ability to render substantial and continued service at the low rates proposed. The certificates were granted in view of the sentiment among mercantile shippers for such service and the impracticability of ordering a more established carrier in the neighboring vicinity to extend his route. The Commission stated: "However, the Commission arrived at this opinion out of consideration of P.U.R.1928E.

the long standing and most satisfactory personal relations existing between the applicants and their customers and also on account of the fact that said Gottula, the present certificate holder, made no objection to their being granted a certificate."

The Colorado Commission, in *Re Rahn*, Application No. 830, Decision No. 1567, Feb. 1, 1928, declined to issue a certificate of convenience and necessity for motor carrier operation over a route 245 miles long. The Commission reviewed a report by the Interstate Commerce Commission to the effect that short hauls, 45 miles or less, were profitable, while long hauls were unprofitable. The Commission further stated: "This is, we believe, by far the longest route over which we have been asked to authorize a regular motor vehicle operation. The view is quite generally held by those who have studied the cost of motor operations and the revenues therefrom that an operation of 100 miles (some place the limit considerably lower) can not be profitable."

b. Applicant's personal qualifications.

Subsequent to the transfer of operative rights a purchasing carrier was granted a certificate to perform an express and baggage service carried on for years under the mistaken impression that proper legal authority for such service had been established. *Re Southern Pacific Motor Transport Co.* Decision No. 19284, Application No. 14335, Jan. 23, 1928.

In *Re Rocky Mountain Park Sightseeing Co.* Application No. 550, Decision No. 1583, Feb. 15, 1928, the applicant copartners were man and wife who had previously been refused a certificate because of considerable question as to their real business relationship as well as some difficulty with other operators. Pending an amended application thereafter the equipment had been increased without authority which was later refused approval by the Colorado Commission. The Commission hesitated in granting a certificate on the original equipment, stating: "The evidence shows that satisfactory settlement was made by the applicants with the other operators and that the two applicants are doubtless copartners. However, the Commission feels considerable doubt as to the good faith of much of the conduct of the applicants in using a name similar to that of another well known operator, and in the alleged purchase and operation of the additional equipment, and other matters. It has, however, given the benefit of the doubt to the applicants but feels that it may properly admonish them that their conduct in the future shall be strictly accordingly to law and shall not evidence any intent to violate or evade the law."

Permission to operate motor vehicles over a specified route was denied where it appeared that the applicant was not sufficiently experienced and that he could not meet the requirements of public P.U.R.1928E.

convenience and necessity in the territory to be served. *Re Wood* (Colo.) Application No. 517, Decision No. 1068, Nov. 30, 1926.

An applicant for a certificate of convenience and necessity was previously identified as a prominent stockholder in the corporation operating over the very route which he proposed. The evidence showed that he severed his connections and began the operation of a competitive service without any authority from the Commission. It was also evident that there was adequate bus and rail service between the points proposed. The certificate was refused and the Indiana Commission stated: "The testimony of the applicant in this cause shows that he has violated the Motor Vehicle Act. It is the opinion of the Commission that the applicant knew he was violating said act, and that he should receive such punishment as the law imposes in cases of this kind." *Re Reeder*, No. 818-M, Feb. 3, 1928.

V. Evidence of necessity.

Authorization to operate auto stage service between existing termini but over another route for the major portion of the distance to a territory, the residents of which have not demanded such service, will not be granted where there has been no showing that present service is inadequate or that convenience and necessity demand the additional service. *Re Sutherland* (Cal.) Decision No. 19120, Application No. 14148, Dec. 15, 1927.

The Indiana Commission, in *Re Chicago, S. S. & S. B. R. Co.* No. 808-M, Jan. 6, 1928, approved an application for authority to operate an auto freight service supplemental to rail service within a city where the evidence showed that the operation of the tractors and trailers to be used in such supplemental freight service was for the exclusive purpose of transporting freight from one depot to another on the applicant's line of railroad located in said city, and that prior to that time this work had been performed by freight cars operating through the congested district of the city, contrary to the wishes of the city officials, and that it would be more advantageous to all parties at interest to have the supplemental service substituted therefor.

VI. Preferences between applicants.

As between conflicting applicants for a certificate, a motor transport company and subsidiary of a rail carrier, being able to give more suitable and permanent service, was granted a certificate rather than an individual, where the rail carrier proposed to abandon service over the route in question. *Re Balish* (Cal.) Decision No. 191514, Application Nos. 14105, 14126, Dec. 23, 1927.

The California Commission, in *Re Pacific Electric R. Co.* Decision No. 19360, Application No. 14374, Feb. 15, 1928, granted authority to an interurban railway to operate a co-ordinated bus service to the P.U.R.1928E.

grounds of an annual carnival during the period when it should be open, without additional fare, in preference to a protestant stage line not co-ordinated with other services and proposing to charge an additional fare.

A motor transportation company was held to be the applicant best qualified to undertake a proposed stage and express service, in that it afforded a rate schedule averaging less than the proposal of an applicant electric railway, was well qualified financially, was operating presently authorized lines satisfactorily and without a deficit, and in addition, was the prior applicant. *Re United Stages (Cal.)* Decision No. 19443, Application Nos. 5269, 10368, 10406, March 5, 1928.

VII. Conditions.

A certificate for auto stage operation was granted with the understanding that, the applicant pioneering in a field not occupied, the proposed service might require readjustments from time to time to make it fit with the express public need. *Re Carpenter (Cal.)* Decision No. 19160, Application No. 14150, Dec. 23, 1927.

VIII. Sales, transfers, and assignments.

As an automotive operative right is indivisible, after the granting of an application to transfer such a right the parties can not, by tariff filings, carry out the terms of an agreement not set forth in the application whereby the vendor company will continue transporting freight and the vendee company will confine its operations to the transportation of passengers and express. *Re Bacon Service Corp. (Cal.)* Decision No. 19088, Application No. 14138, Dec. 2, 1927.

In authorizing the operation of a stub automotive passenger service to a year-round resort by an existing transportation company, and the transfer to such company of other operative rights, the California Commission does not grant a separate operative right to such resort, but simply authorizes a service to be performed under the consolidated operative rights authorized to be transferred. *Re Selby, (Cal.)* Decision No. 19090, Application No. 14175, Dec. 2, 1927.

In *Re Valley & Coast Transit Co.* Decision No. 19262, Application No. 14339, Jan. 18, 1928, the California Commission, upon authorizing the transfer of certain operative rights, denied authority to transfer additional franchises or extensions that might be granted to the operator, stating that whatever interests the present holder might have were of a contingent nature and not assignable.

IX. Revocation and amendment.

In *Bakersfield & L. A. Fast Freight Co. v. Gombos*, Decision No. 19235, Case No. 2395, Jan. 10, 1928, the California Commission dismissed a complaint alleging unlawful operation in the carrying P.U.R.1928E.

ANNOTATION.

of unauthorized commodities under a certificate where the evidence showed that employees of the certificate holder agreed between themselves to transport the merchandise, they and not the certificate holder profiting by such operation.

While a proposed service by a motor vehicle to certain points on a highway would afford a convenience to residents so located, where the volume of traffic so originating would not produce sufficient revenue to justify the expense of operation unless the traffic to and from points already adequately served by rail lines would be included, the application should be denied. *Re Cochran* (Cal.) Decision No. 19167, Application No. 12474, Dec. 23, 1927.

Suspension of operation without the knowledge and approval of the Commission is a relinquishment of any operative right formerly granted. *Coulter v. Anderson* (Cal.) Decision No. 19165, Cases Nos. 2399, 2420, Dec. 23, 1927.

An operator of auto stage service having discontinued and abandoned the operation thereof without securing the authorization of the Commission, the operative rights were revoked and annulled. *Re Duggan* (Cal.) Decision No. 19162, Case No. 2421, Dec. 23, 1927.

A certificate of convenience and necessity was revoked upon a showing that the operator of an automotive transportation service had abandoned without authorization his operative rights for the transportation of passengers, baggage, and express. *Re Hazard* (Cal.) Decision No. 19183, Case No. 2431, Application No. 14206, Dec. 23, 1927.

Upon abandonment of service operated under a certificate of convenience and necessity automotive operative rights should be revoked. *Re McGann* (Cal.) Decision No. 19115, Case No. 2430, Dec. 10, 1927.

In *Re Danville-Terre Haute Ltd. Bus Co.* No. 78-M, March 2, 1928, permission was granted a bus company to eliminate a certain town from the authorized route under its certificate of convenience and necessity where it was shown that there was very little demand for such service and an inspection of the road conditions indicated that the road to the town connecting it with the state road was narrow, had some very abrupt turns, making operation over the particular portion dangerous for busses of the size in operation. The Indiana Commission also pointed out that service into the town by a more circuitous route was unjustified in view of the amount of revenue derived.

In *Re Reeder*, No. 607-M, Feb. 24, 1928, a petition asking that a certificate of convenience and necessity be declared forfeited, on account of nonuse and failure to serve the public was refused where the Indiana Commission was of the opinion and found that an in-P.U.R.1928E.

sufficient number of patrons had signed the petition referred to and made a part of the cause.

In *Shepherd v. Garrison*, Case No. 5561, March 9, 1928, the Missouri Commission believed that a motor carrier had not wilfully intended to disobey a Commission order with respect to compliance with a time schedule where the defendant had sent the Commission a copy of the schedule about which the complaint was made. The Commission accepted the carrier's statement that he thought he was acting within his rights and the certificate of convenience and necessity was not revoked.

X. Procedure.

In Re Sierra R. Co. Decision No. 19306, Application Nos. 13647, 13708, Feb. 6, 1928, the California Commission held that where an individual who was sole owner of certain bus rights applies with another individual, designated a "partner" but who has only a prospective interest in an application to extend such operative rights, such application of the "partners" cannot be considered in any relation to the present operative rights held by the individual.

MARYLAND COURT OF APPEALS.

HAROLD E. WEST et al.

v.

PHILADELPHIA, BALTIMORE & WASHINGTON RAIL-
ROAD COMPANY.

[No. 63.]

(— Md. —, 141 Atl. 509.)

Commissions — Jurisdiction and powers — Limitation.

1. The Public Service Commission of Maryland, created by the Acts of 1910 (Chap. 180), exercises a naked statutory authority, and has no powers except such as are expressly granted by the legislature, and such implied powers as are necessary to carry out the express powers, p. 148.

Commissions — Power over managerial question — Protection of local property.

2. The Commission, in passing upon a proposed relocation of track by an interstate railroad, is without authority to compel the carrier to relocate at a grade which, in the judgment of the company, will hamper efficiency and economy of operation where the general traveling public convenience does not require it and local property owners alone will be benefited thereby, p. 150.

P.U.R.1928E.

Commissions — Extent of Commission's power to protect public interest.

3. The public interest which is committed to the protection of the Commission is confined to the operation of utilities in such a manner as to furnish efficient service at reasonable rates, and it has no power to interfere with any corporate act or policy which will not in some manner adversely affect such public interest in rates or service, p. 152.

Commissions — Power over managerial questions — Directorate powers.

4. There is nothing in the Public Service Acts of Maryland to support the theory that its purpose was to substitute the Commission for directors and officers of the corporation and the management and operation of a railroad, but every presumption is to the contrary, p. 152.

Commissions — Powers — Track relocation — Local and general public.

5. The fact that a railroad is required by statute to secure the consent of the Commission to a relocation of track does not warrant the latter in arbitrarily withholding its approval at its own discretion for the benefit of private property holders, p. 154.

Public utilities — Public interest governed by character of utility.

6. The statutory meaning of "public interest" must vary to some extent with the character of the utility and will be narrower when applied to the utilities having localized functions such as water, light, and gas supply than in the case of railroads affecting service to the whole public, p. 155.

Commissions — Protection of public interest as a whole — Railroads.

7. The action of the Commission in dealing with the interests of the wider public involved in a railroad relocation should not be hampered or influenced by the necessity of considering the effect of the improvement on the local public, where it will beneficially affect the wider public of which the local public is a part, p. 155.

Railroads — Forced relocation — Privileges.

8. A railroad company compelled to relocate tracks because of public construction, such as a power dam, is entitled to establish them on a new location at a grade as advantageous as that which it has been forced to abandon, or at least as far as that may be practical, p. 156.

(ADKINS, J., dissents.)

[April 11, 1928.]

APPEAL by Public Service Commission from decree of Circuit Court of Baltimore City (No. 2) setting aside order of Commission for a railroad relocation at a 38 per cent grade and permitting at 35 per cent grade; affirmed.

Argued before Bond, C. J., and Pattison, Urner, Adkins, Offutt, Digges, Parke, and Sloan, JJ.

Appearances: Raymond S. Williams, of Baltimore, for app.
P.U.R.192SE.

pellants; William Pepper Constable, and William L. Marbury, Jr., both of Baltimore (William L. Rawls and Roland R. Merchant, both of Baltimore, on the brief), for appellee.

Offutt, J.: This appeal grows out of an irreconcilable conflict between the views of the respective parties as to the powers, functions, and duties of the Public Service Commission of Maryland, in the exercise of the control and supervision conferred upon it by the Legislature over the operation and management of public service corporations. The precise question which it presents is whether the Commission has the power to annex, as a condition precedent to its permission to a railroad company engaged in interstate commerce to relocate its tracks a requirement that the tracks, as relocated, shall be at a grade which in the judgment of the railroad company will be inconsistent with the efficient and economical operation of the railroad, when such a condition is not required by any consideration for the convenience or welfare of the general public, but is solely in the interest of persons whose property would be affected by the relocation. It involves a consideration of whether the "public," in whose interest the Commission was created, means the whole public or only that part of the public whose property rights are directly or consequentially affected by the construction, operation, or maintenance of some public utility under its control and supervision.

To understand the scope and significance of the inquiry it will be necessary to examine briefly the background of the conflicting theories and the circumstances under which the question arises in this case.

The Philadelphia, Baltimore & Washington Railroad Company, herein called the Railroad Company, is the successor of the Columbia & Port Deposit Railroad Company, which was incorporated by chap. 103 of the Acts of 1858 of the General Assembly of Maryland, amended by chap. 31 of the Acts of 1864, and which was later merged by a consolidation with the Columbia & Port Deposit Railroad Company of Pennsylvania. Later still its lines were leased to the Pennsylvania Railroad Company and are used as a part of its system.

P.U.R.192SE.

Acting under the powers conferred by its charters the Columbia & Port Deposit Railroad Company, constructed, and appellee for many years operated a railroad along the east bank of the Susquehanna river, between Perryville, in Maryland, to a point in Pennsylvania, passing in its course through the town of Port Deposit.

Some time prior to 1906 interested persons conceived the idea of utilizing the water power of the Susquehanna river by the construction of dams and the establishment of power plants at McCall's Ferry, in Pennsylvania, and at Conowingo, in Maryland, and in furtherance of that plan the McCall's Ferry Power Company was incorporated, and it constructed a dam and power plant at McCall's Ferry, and apparently contemplated the construction of another dam at Conowingo, for in 1906 it entered into an agreement with the Railroad Company as to the relocation of that part of its roadbed which would be affected by the construction of both dams. But in 1908 the Susquehanna Power Company, herein called the Power Company, acquired the rights and property of the McCall's Ferry Company along the Susquehanna river below Cully's Falls, and assumed all its obligations in respect to the relocation of the tracks of the Philadelphia, Baltimore & Washington Railroad Company made necessary by the erection of a dam at Conowingo, to which substitution that company assented, and on March 24, 1908, it executed with the Power Company a supplemental agreement assenting to the substitution. In the agreement of 1906 the McCall's Ferry Power Company agreed, in case it undertook to build the Conowingo dam—"to acquire, as hereinafter provided, the right of way and construct such relocated railbed, track, and appurtenances between a point about 850 feet south of Fishing Creek Station, Lancaster county, Pennsylvania, and Rock Run Station, Cecil county, Maryland, the said relocated roadbed, track, and appurtenances to be constructed upon such alignment and with such grades and in accordance with such plans and specifications as the railway companies may prescribe, and subject to the approval of their chief engineer, or his representative, it being hereby understood and agreed that the alignment shall not be less favorable, nor shall it be required to be more favorable, than P.U.R.192^{SE}.

that of the present roadbed and track of the said railway between the said points, but that there shall be no grades opposed to the west-bound traffic and that the grades opposed to the west-bound traffic shall not be more than 0.3 per cent equated for curvature, excepting that until the work of constructing the Conowingo dam is undertaken the grade against the west-bound traffic may be 0.5 per cent between a point 850 feet south of Fishing Creek Station and a point 500 feet south of Benton Station."

The charter of the Susquehanna Power Company was amended by chap. 268 of the Acts of 1908 of the General Assembly of Maryland, which authorized it—

to "locate and build in, along, or across the said river, and the bed and shores thereof, and the canals, railroads, ferries, and highways thereon, there along or leading thereto, any dam or dams, the crest or crests of which shall not exceed an elevation of 110 feet above mean low tide at Havre de Grace, said dam or dams to be located at any points between Tidewater and Mason and Dixon's line." § 3.

Acting under its charter powers, the Susquehanna Power Company made arrangements and formulated plans for the erection of a dam across the Susquehanna river at a point some distance below Conowingo, and applied to the Public Service Commission at Maryland for its approval of its plans for financing the project. The Commission approved the plans, and the Power Company proceeded with the work of erecting a dam which would raise the waters of the Susquehanna river to a point 108.5 feet above mean low tide at Havre de Grace, or 60.9 feet above the old level of the river.

As has been stated, the tracks of the railroad were located along the northeast bank of the river, and upon the completion of the dam would necessarily be submerged by the waters impounded by it, and if the railroad was to continue it was necessary to relocate its tracks on some line where its operation would not be affected by the new water level of the pool. The relocation was, of course, required by the necessities of the Power Company, and since the Railroad Company was satisfied with the then existing location of its tracks the Power Company assumed the burden of paying all expenses incident to the relocation which
P.U.R.1928E.

was to be constructed, however, under the direction and supervision of the Railroad Company.

The Columbia & Port Deposit Railroad Company was, as has been stated, consolidated with the Philadelphia, Baltimore & Washington Railroad Company, and the lines of that company are leased to the Pennsylvania Railroad Company and are operated as a part of its system. For some years past the policy of the latter company has been to establish its railroads as low grade lines, and from time to time it has expended "vast sums" of money in changing, projecting, and building its lines in furtherance of that policy, which has also been adopted by other railroad systems throughout the country, and which is responsible for the present rate structure in the United States, and without which that structure could not be maintained. One of the low grade lines operated by the Pennsylvania Railroad Company as a part of its system is the Columbia & Port Deposit line, the maximum grade of which before the relocation of the tracks was, except for a relatively short section at Fishing Creek, approximately .3 per cent.

The Railroad Company in accordance with its policy undertook to see that the grade of the line as relocated should be no heavier than that, and accordingly, its first agreement with the McCall's Ferry Power Company provided for a .3 per cent grade, except that a 5 per cent grade was allowed on a short section at Fishing Creek, in Pennsylvania.

That agreement was based, however, upon the hypothesis that the dam would be erected at Conowingo, but when application was made to the Federal Power Commission, for authority to proceed with the power project, that Commission, to better utilize the power of the river, ordered the dam to be located at a point east of Conowingo. That change materially altered the conditions which would have resulted from the establishment of a roadbed on a .3 per cent grade, as originally contemplated, and would not only have made the construction very expensive, but would have had a ruinous effect upon the town of Port Deposit, since it would have required an embankment through the town which would have been 20 feet high at Port Deposit Station, and since the location of the dam could not be changed without the P.U.R.1928E.

approval of the Federal Power Commission, the Railroad Company and the Power Company agreed that the relocation should be at a grade of .35 per cent instead of .3 per cent as originally provided. Thereafter the Railroad Company applied to the Public Service Commission of Maryland for its approval of a relocation of its tracks to be located and graded in accordance with the following description:

"The proposed new line, as shown in solid red, is the location selected as best fitting the contour of the ground for the ascending grade of .35 per cent north bound, properly equated for curvature. It is proposed to secure a right of way 60 feet in width at grade, except within the lines of Port Deposit, where the width of right of way shall be 36 feet at grade, with such additional land as may be required for slopes, cuts, fills, and for drainage purposes, and in addition such land for station lots, signal towers, water facilities, and all other appurtenances will equal in area the land now held and owned by the railroad for such facilities. . . . The elevation of the top of rail of the relocated rail was fixed at the Conowingo dam by the elevation of the water in the new pool, viz., plus 108.5 United States government and Pennsylvania Railroad datum. The elevation of the new top of rail 100 feet west of the base line of the dam will likewise be plus 108.5. The equated grade of .35 per cent, therefore, by starting at the elevation of the water in the dam, will reach the grade of the present tracks at Tome Institute Station, the distance from the base line of the dam to the foot of the grade at Tome Institute being $5\frac{1}{4}$ miles. . . . In order that the top of rail of the relocated line shall be safely above all flood waters, the grade of .35 per cent equated is to be carried northward beyond the dyke a distance of about 3,800 feet from the breast of the dam to reach an elevation of plus 102, United States government and Pennsylvania Railroad datum, which will place the top of rail $11\frac{1}{2}$ feet above the pool level of the dam. The total length of the .35 per cent equated grade from the summit 3,800 feet north of the breast of the dam to Tome Institute Station will be about $6\frac{1}{2}$ miles."

A protest against that application was filed by a committee representing the citizens of the town of Port Deposit, who, after
P.U.R.1928E.

referring to the history, improvements, and advantages of the town, alleged that:

"The relocation of the railroad as projected, elevating these tracks to the height proposed between the river and the street, will have the effect of placing the street in the bottom of a trench and will shut off the view and cut off the breeze and air from the residences, as well as the street, and render the town undesirable as a place of residence.

"In times when the river is in flood, the proposed embankment between the street and the river will render the street a perfect sluiceway. The water pouring through the necessary opening at the north end of the town will become a perfect torrent, flowing down the street, destroying property the entire length of the embankment.

"If this plan of relocation of the railroad as projected by the Pennsylvania Railroad is carried out, the result will be the absolute destruction of the adjacent property and will materially depreciate all property values through the town.

"We have been assured by competent engineers that the raising of this embankment is absolutely unnecessary, as the railroad, by increasing their grade no more than one-half inch in each 100 feet, would avoid the destruction of our town."

To understand that protest a brief description of the town is necessary. It is situated in the gorge of the Susquehanna, and is located on a narrow strip of comparatively level land which lies between a series of high bluffs on the east and the river on the west. A state road connecting the state highway at Perryville and the Conowingo road runs through it from northwest to southeast. Between that road and the river are the tracks of the Railroad Company, on which there are two stations, one, the Tome Station, at the southern end of the town, and another, the Port Deposit Station, a short distance north of that. Relocating the railroad at a grade of .35 per cent would require a fill or embankment beginning at zero at the Tome Station and rising to 6.7 feet at Port Deposit Station, and to 15.11 feet at Rock Run near the northern limit of the town. As the grade of the relocated railroad is increased, the height of that embankment or fill will be decreased, which will appear if the roadbed is P.U.R.1928E.

regarded as a straight line, one end of which is fixed at a point 3,800 feet north of the dam at an elevation of 108.5 feet above mean low tide at Havre de Grace, and the other end is at the elevation of the original roadbed at Tome Station $6\frac{1}{2}$ miles away, which we will call zero. In such a case, as the zero end of the line is lowered the grade is increased, and the embankment or fill decreased, but as it is raised the grade is lowered and the height of the embankment increased.

The buildings and improvements in the town are for the most part located along the state highway, and the effect of the embankment required to maintain a grade of .35 per cent would be, the protestants claimed, to obstruct their view of the river, to lessen the light and air which they now receive, and to convert the main street of the town into a sluiceway through which the waters of the river will pour in time of flood.

The Commission, after considering the application and the protests and hearing evidence offered in connection with them, refused it as made, but authorized and permitted the Railroad Company to change the location of a portion of its line of railroad extending from a point near Port Deposit Station, Maryland, to the Maryland-Pennsylvania state line, as in the petition herein set forth, provided that that portion of the said line of railroad between a point about 200 feet south of Port Deposit Station and a point where it will run out south of the Octarora bridge, when so relocated, shall be built to a .38 per cent grade instead of to a .35 per cent grade as proposed by the said company, and provided further, that the said Philadelphia, Baltimore & Washington Railroad Company shall provide access to the Susquehanna river by suitable means at points where public crossings now exist. [P.U.R.1927E, 398.] From that order the Railroad Company appealed to circuit court No. 2 of Baltimore city, and on December 24, 1927, that court decreed:

"That the proviso attached by the Public Service Commission to its approval of the application of the Philadelphia, Baltimore & Washington Railroad Company for the relocation of its lines between a point 2,000 feet south of Port Deposit, Cecil county, Maryland, to a point beyond the Maryland-Pennsylvania state line, is null and void,"

P.U.R.1928E.

—and remanded the case to the Public Service Commission, directing it to approve the relocation at a grade of .35 per cent. From that decree this appeal was taken.

The evidence offered before the Commission, while divergent, was for the most part not conflicting. The witnesses for the Railroad Company testified that the change of .03 per cent in the grade ordered by the Commission would diminish the tonnage which an engine of given power could draw over the road, would seriously impair its value as a low grade line, would interfere with the established policy of the entire system, of which that section was a part, of maintaining low grade lines, and such interference, if generally permitted, would have an effect on the rate structure now prevailing to the detriment of the general public; that the efficiency of a low grade system is to some extent measured by the grade of any section of the road over which its cars are generally routed, because the capacity of the whole line is measured by the heaviest grade on it where it is long enough to overcome the momentum of the train, rather than by its average grade; and that the original grade of the road was .3 per cent. While there was some disposition to question these conclusions, the testimony offered for that purpose was not sufficient to affect their value, and they must be taken as established.

The evidence offered by the protestants was sufficient to show that the proposed relocation on a grade of .35 per cent will seriously affect property values in at least a part of the town of Port Deposit and will seriously interfere with the convenience of at least some of its inhabitants, but whether it will have the extreme effects prophesied by some of the witnesses was not so clearly shown.

[1] The Public Service Commission of Maryland was created by chapter 180 of the Acts of 1910. It exercises a naked statutory authority, and has no powers save such as were expressly granted to it by the legislature and such implied powers as are necessary to enable it to exert its express powers. Northern Central R. Co. v. Public Service Commission, 124 Md. 152, 91 Atl. 768, Ann. Cas. 1916D, 1030; 22 R. C. L. 783; Oregon R. Comrs. v. Oregon R. & Nav. Co. 17 Or. 65, 19 Pac. 702, 2 L.R.A. 195. Its creation was dictated by a governmental policy P.U.R.1928E.

of delegating to certain boards, commissions, and other similar agencies administrative powers and functions in respect to the supervision and control of corporations employed in a public service, which found expression in such laws as the Interstate Commerce Commission Act of February 4, 1887 (49 USCA § 1 *et seq.*; U. S. Comp. St. § 8563 *et seq.*), and in many statutes of a similar nature that state legislatures have passed since that time. That policy was the outgrowth of necessity, and the paramount law of self-preservation. The welfare, safety, and convenience of the public depended so closely upon the fair and efficient administration of corporations engaged in furnishing transportation, light, power, water, sewage, and other sanitary facilities to the public that it became necessary to devise some agency by which they could be supervised and controlled in the exercise of their corporate functions, and in the use of the privileges granted to them by the state so as to insure the highest quality of service commensurate with the compensation charged, and to secure a relation between service and rates fair alike to the corporation and the public. *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 208, 40 L. ed. 940, 16 Sup. Ct. Rep. 666; *Interstate Commerce Commission v. Baltimore & O. R. Co.* 145 U. S. 263, 36 L. ed. 699, 12 Sup. Ct. Rep. 844. Within those limits such legislation has generally been recognized as constitutional, although there are bounds beyond which the legislature cannot go, as for instance, under the guise of regulation and control, it cannot authorize the destruction or confiscation of vested rights, or in the absence of any unlawful act or breach of duty without just compensation completely take over the operation and management of the corporation, nor can it delegate strictly legislative or judicial powers and functions to such an agency. 22 R. C. L. 780; 12 C. J. 847, 900. Turning from these general principles to statutes creating commissions or boards for the supervision and control of railroad corporations, it is found that the basic policy running through them all is the protection of the whole public affected by the efficient operation of the railroads for the transportation of freight or passengers at reasonable rates, rather than the protection of private interests affected by the operation of the railroad.

P.U.R.1928E.

[2] In this case the conflict in the views of the respective parties is the result of the different interpretations which they give the word "public" as used in the statute defining the powers of the Commission. As the appellants construe it, it authorizes the Commission, in dealing with an application such as that made in this case, to consider the effect of the proposed plan upon private property adjacent to the relocated railroad, and to weigh and balance any damage which it may cause to that property against any advantage which it will give the railroad company, and to grant it or refuse it as the one or the other preponderates. The appellees, however, contend that the only interest which the Commission can consider is the interest which the whole public has in the maintenance of an efficient transportation system furnishing to the public adequate facilities at reasonable rates. Both of these views have been forcibly and ably presented in this court, but in our opinion the question is free from any real difficulty. The legislature, when by Chapter 103 of the Acts of 1858, it authorized the Columbia & Port Deposit Railroad Company "to lay off and construct a railroad not exceeding eighty feet in width, with one or more sets of tracks from Port Deposit, in Cecil county, to the Pennsylvania and Maryland line, so as to connect with a contemplated railroad in the state of Pennsylvania, from Columbia to the said Pennsylvania and Maryland line, and for the purpose of laying off and constructing the said road, they shall have all the powers and privileges, and be subject to all the restrictions and liabilities hereinafter described, and they may take and adopt the route which to them may seem most suitable and proper," must necessarily have considered the effect that such a railroad would have upon the territory to be traversed by it, and it will not be presumed, in the absence of a clear and express declaration to that effect, that it has delegated to any other agency the power to reconsider that question and to review and revise its judgment so as to take away the corporate franchise which it granted, or strip it of incidents essential to its value after the corporation had accepted the franchise, built the railroad, together with its appurtenant switches, sidings, yards, etc., and operated it for many years. Certainly, no such authority is to be found in the language of the statutes creating the Com-P.U.R.1928E.

mission and defining its powers, duties, and functions, nor in any of the decisions of this court construing those statutes. Article 23, § 362, provides:

(1) "Every corporation, person or common carrier performing the services designated in the preceding sections shall furnish, with respect thereto, such service and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such common carrier for the transportation of passengers, freight or property, or for any service rendered or to be rendered in connection therewith, as defined in § 349, shall be just and reasonable and not more than allowed by law or by order of the Commission, conformably with the law. . . . The Public Service Commission herein created and established shall have the general supervision of all common carriers, railroads, street railroads, railroad corporations and street railroad corporations, transporting passengers, freight or property from one point to another within the state of Maryland, and shall have power to and shall examine the same or cause the same to be examined and keep informed as to their general condition, their capitalization, their franchises and the manner in which their lines, owned, leased, controlled or operated and managed, are conducted or operated within this state both with respect to the adequacy, security and accommodation afforded by their service, and also with respect to their compliance with all provisions of law and orders of the Commission."

Section 370 provides, in part, that:

"The Commission shall have the general supervision of all common carriers, railroads, street railroads, railroad corporations and street railroad corporations, and all other corporations and persons subject to the provisions of this subtitle as herein-before defined, and shall have the power to and shall examine the same and keep informed as to their general condition, their capitalization, their franchises and the manner in which their lines, owned, leased, controlled or operated, are managed, conducted and operated, not only with respect to the adequacy, security and accommodation afforded by their service, but also with respect to their compliance with all provisions of law, orders of the Commission and charter requirements."

P.U.R.1928E.

[3, 4] Section 372 gives the Commission the right to investigate the cause of all accidents on railroads; § 376 gives it the power to require the carrier to use a sufficient number of men to efficiently operate freight trains; § 379 prohibits any railroad company from exercising any franchise or right without the approval of the Commission, and further provides that:

"The Commission shall have power to grant the permission and approval herein specified whenever it shall, after due hearing, determine that such construction or such exercise of the franchise or privilege is necessary or convenient for the public service."

These quotations fairly reflect the purpose and scope of the entire statute, and it is manifest from an examination of it, as well as of them, that the public interest which is committed to the protection of the Commission is the interest which the public has in the operation of railroads in such a manner as to furnish efficient service at reasonable rates, and that the power of the Commission over railroad companies lies within those limits. That is to say it has no power to interfere with any act or policy of the corporation which will not in some manner adversely affect the public interest in its service or rates. There is nothing in the acts to support the theory that its purpose was to substitute the Commission for the directors and officers of the corporation in the management and operation of the railroad, but every presumption is to the contrary. In *Gregg v. Public Service Commission*, 121 Md. 1, 30, 87 Atl. 1111, 1114, it is said:

"It is perfectly apparent that the purpose was to place all corporations handling public utilities under the supervision and control of the Public Service Commission and with power in the Commission to regulate the rates charged for service, but that until the Commission did so regulate the charge any act or acts in force respecting them should remain unimpaired."

In *Hyattsville v. Washington, Westminster & Gettysburg R. Co.* 122 Md. 660, 90 Atl. 515, it was held that the Commission had the power to determine the character of a grade crossing, but that conclusion is supported by the police power of the state exerted to protect the traveling public in the lawful use of a public highway as well as to protect the patrons of the railroad.
P.U.R.192SE.

See cases in note L.R.A.1915E, 751, etc. In Northern Central R. Co. v. Public Service Commission, 124 Md. 141, 91 Atl. 768, Ann. Cas. 1916D, 1030, the Commission ordered the railroad company "to cease and desist from placing said train No. 200 on a side track or otherwise detain it when running on its own schedule time, and from holding it back at point of origin in order to give the right of way to through or interstate trains." In reviewing that order this court said:

"The effect of the order is to deprive the railroad company of all discretion in respect to the operation of its trains at the time of such delays, which discretion, we think, is absolutely essential to the proper and efficient management and operation of the road and to the safety and general welfare of its passengers; and to the extent that the company is deprived of such discretion the Commission has by its general order attempted to operate the appellant's road, and in doing this we think it has exceeded the powers conferred upon it by the statute."

In Public Service Commission v. United R. & Electric Co. 126 Md. 478, 488, P.U.R.1915F, 474, 95 Atl. 170, it was held that the Commission had no power to compel a street railway company to extend its lines where the extension would in its judgment be unprofitable. In the Havre de Grace & P. Bridge Co. v. Towers, 132 Md. 16, 22, P.U.R.1918D, 484, 103 Atl. 321, it is said:

"The only question is, Is the Commission invested by the legislature with the power to direct and control the financial policy of this company?

"The same question was presented to this court in Laird v. Baltimore & O. R. Co. 121 Md. 179, 88 Atl. 347, 348, 47 L.R.A. (N.S.) 1167, Ann. Cas. 1915B, 728, and it was there held that extensive as were the powers granted to the Commission, they did not take away from the corporation its power of control upon a question of financial policy. The same question was raised in People ex rel. Binghamton Light, Heat & P. Co. v. Stevens, 203 N. Y. 7, 96 N. E. 114, where the grant of power to the Public Service Commission was very similar to that contained in our act of 1910 (Laws 1910, c. 180), and the court in that case said: 'The discretion of a Public Service Commission cannot override P.U.R.1928E.'

the discretion of the officers of a corporation in the management of its affairs.'

"In the earlier case of *People ex rel. Delaware & H. Co. v. Stevens*, 197 N. Y. 1, 90 N. E. 60, the court had said: 'We do not think the legislation alluded to was designed to make the commissioners the financial managers of the corporation, or that it empowered them to substitute their judgment for that of the board of directors or stockholders of the corporation.'"

In *Benson v. Public Service Commission*, 141 Md. 398, 403, P.U.R.1923B, 424, 118 Atl. 852, 854, in construing § 379, the court through Judge Stockbridge said:

"Probably the strongest point upon which the appellants can rely are the words to be found in § 26 of the act of 1910, that the operation of such road 'is necessary or convenient for the public service.' It may not be entirely easy to give a strict definition of this language, but the same expression is found in a number of other acts in which, where cases have arisen, the abandonment of the line has received judicial approval, when it has been shown, far less conclusively than in the present case, that the operation must result in so serious a financial loss as to render it certain that the road would, before the lapse of much time, inevitably go into the hands of receivers."

[5] See also, *Public Service Commission v. Consolidated Gas, E. L. & Power Co.* 148 Md. 90, 129 Atl. 22.

In this case the Commission points to §§ 373 and 379 of article 23 [Code Pub. Gen. Laws] as the source of its power for the passage of the order which is the subject of this appeal, but it suggests no valid reason for that contention and we have been able to discover none. Section 373 authorizes it to require "improvements to" or "changes in any tracks . . ." of any "railroad corporation" which "ought reasonably to be made" to "promote the security or convenience of the public or employees." But the "public" referred to in that section obviously means the whole public, and not a particular part of it owning property contiguous to the railroad, and it is not apparent how the interest of the whole public would be served by requiring a railroad to be constructed at a grade which would make transportation over it more expensive and less efficient. Nor is there P.U.R.1923E.

anything in § 379 to justify its action. That section does, it is true, require the Railroad Company to secure the approval of the Commission before relocating its tracks, and gives it the "power" to grant its approval whenever, after due hearing, it determines that the relocation is "necessary" or "convenient for the public service." But the grant of the "power" also imposed a correlative duty to exercise it in a proper case, and whilst the language could have been plainer, nevertheless it is clear enough that it did not mean to leave to the uncontrolled and arbitrary discretion of the Commission the right to grant or withhold its approval at its pleasure. The legislature could never have meant that in such a case as this the usefulness of a vital link in an interstate transportation system could be crippled or destroyed, through the refusal of the Commission to approve a relocation of its tracks in accordance with plans which would insure better service at less expense. But it imposed upon the Commission the duty of approving the relocation when in its judgment it would be either necessary or convenient for the "public service," and by "public service" it meant the service which the Railroad Company was obliged, under its charter, the statutes of this state and the statutes of the United States, and regulations passed pursuant to the authority therein contained, to render.

[6, 7] Whether a corporation shall be created, what its powers, duties, functions, and privileges shall be, are all essentially legislative questions, and the legislature cannot delegate its power to deal with them to any other body whatever. *Bradshaw v. Lankford*, 73 Md. 428, 430, 21 Atl. 66, 11 L.R.A. 582, 25 Am. St. Rep. 602; 12 C. J. 839. But it may delegate to a governmental agency the duty of ascertaining whether the conditions and circumstances prescribed as conditions precedent to the operation of the statute or the exercise of any right or privilege under it exist, and where the powers and privileges granted are affected by a public interest it may delegate to such a body the power and the duty to regulate and supervise the exercise of such powers and rights, and for that purpose may clothe it with powers quasi judicial and quasi legislative in character. *State v. Great Northern R. Co.* 100 Minn. 445, 111 N. W. 289, 10 L.R.A. P.U.R.1928E.

(N.S.) 250. Upon this principle the right of the legislature to delegate to a Public Service Commission the right to determine whether the exercise by a corporation of a franchise to supply some public utility is consistent with the public welfare, and in exercising that power the right to consider such matters as the capacity of the corporation to render satisfactory service, and the effect which the exercise of the franchise may have upon other corporations or agencies rendering like service in the same field. Obviously the meaning of "public interest" in such cases must vary to some extent with the character of the utility. Where the utility is by its nature confined to a definite and limited territory such as the supply of water, gas, light, power, or sewage facilities, the "public" affected is narrower than in the case of a railroad which offers service to the whole public. And the Commission, in determining whether a corporation should be allowed to exercise a franchise to supply the inhabitants of a given territory with water, might be affected by considerations which would not influence it in determining whether a railroad company should be permitted to exercise a right to make some change in its road which would enable it to render better and cheaper service, but in either case the controlling consideration would be the public interest—in the one case, the interest of what might be called the "local public" served by the water company; in the other, the interest of the wider public served by the railroad. And in dealing with the interests of the wider public we do not feel that the action of the Commission should be hampered or influenced by the necessity of considering the effect of the improvement on the local public, when its effect on the wider public of which the local public is a part will be beneficial.

[8] This case, in our judgment, demonstrates the soundness of that conclusion. Here the state authorized the construction of a dam which necessarily destroyed a section of the appellee's railroad, and made it impossible for it to operate it at all unless it relocated its tracks. Under that compelling necessity it applied for permission to relocate its tracks under the authority of § 206, art. 23, Code [Pub. Gen. Laws], and was entitled to demand that it be permitted to establish its railroad on the new P.U.R.1928E.

location at a grade as advantageous as that which it had been forced to abandon so far as that was reasonably and practically possible. That application was refused on the ground that, while the proposed grade of the relocated road would be in the interest of the whole public, it would be against the interest of the local public, the effect of which was to some degree to subordinate the interest of the whole public to the interest of a part of it.

That such a policy if permitted might have a disastrous effect upon the interests of the whole public can hardly be questioned. The health, security, and convenience of the inhabitants of the whole nation largely depend, under existing conditions, upon adequate facilities for the transportation of freight and passengers. Such facilities are in a large part furnished by its railroad systems, for which there is no adequate available substitute. Taken together, they form an intricate network of ways over which the products of any part of the country may be transported with reasonable dispatch and at reasonable rates to any other part of the country, however remote. The efficiency of these systems depends largely upon the maintenance of low grades in the construction of their roadbeds. Transportation over such grades is cheaper than transportation over heavier grades. That saving is reflected in the rates charged for the service, and benefits the whole public, and, whilst that general policy may result in hardships in individual cases, it is essential to the welfare of the whole public. For if railroads were required to raise or lower their grades to serve the convenience or advance or protect the interests of that part of the local public owning land or residing in its vicinity, their efficiency would be greatly lessened.

For these reasons, in our opinion, the Commission in annexing to its permit for the relocation of appellee's railroad a proviso that it should be established at a grade of .38 per cent exceeded its powers, and the application of the railroad to relocate its railroad at a grade of .35 per cent should have been granted. The decree of the trial court will, therefore be affirmed.

Decree affirmed, with costs.
P.U.R.1928E.

WISCONSIN RAILROAD COMMISSION.

WAUZEKA CREAMERY COMPANY et al.

v.

WAUZEKA LIGHT & POWER COMPANY et al.

[U-3696.]

Return — Methods of financing — New addition.

1. Current assets offsetting the reserve for depreciation can be used temporarily for additions or extensions to fixed capital, p. 159.

Return — Reasonableness — Percentage allowed — Electricity.

2. A return of 9.25 per cent of the book value of utility property was found to result from economical operation and profits made up from merchandising business and considerable deferred maintenance which would eventually have to be taken care of, and accordingly the rate although somewhat abnormal was not disapproved, p. 159.

Rates — Electricity — Heat and refrigeration — Service.

3. The power rate of an electric utility was ordered to be extended so as to include energy used for heating and refrigeration purposes in order to develop this class of service, p. 159.

[July 30, 1928.]

COMPLAINT by consumer against alleged excessive rates for service; rates adjusted.

By the Commission: Complaint was filed March 10, 1928, by the Wauzeka Creamery Company et al. relative to the rates for electric service supplied at Wauzeka by the Wauzeka Light & Power Company. This latter utility purchases its supply of electrical energy from the Interstate Power Company which has been made a party to these proceedings. The lawful rates now in effect at Wauzeka are as follows: [Schedule omitted.]

Hearing was held at Wauzeka, March 30, 1928, the appearances being: V. L. Patterson, for Wauzeka Creamery Company; J. P. Cullen, attorney, Steuben, for village of Wauzeka; W. L. Sillge for Wauzeka Light & Power Company; George Taylor, Dubuque, for Interstate Power Company.

Wauzeka is supplied with energy from the transmission line extending from Prairie du Chien to Boscobel. The rate paid by the Wauzeka Light & Power Company to the Interstate Power Company for energy to be sold as lighting is 6.5 cents per P.U.R.1928E.

kilowatt hour. Energy to be sold for power is being purchased at the following rates:

First 600 kw. hrs. per month	6 cents per kw. hr.
From 600 to 1600 kw. hrs. per month	5 cents per kw. hr.
From 1600 to 2500 kw. hrs. per month	4 cents per kw. hr.
Over 2500 kw. hrs. per month	3½ cents per kw. hr.

A discount of 10 per cent on power bills is allowed if paid on or before the 15th. A monthly minimum requirement of \$50 is provided for.

No appraisal has been made of respondent's property. Examination of the annual reports filed by the Wauzeka Light & Power Company between 1920 and 1927 shows that from a value of \$7,801.63 as reported on December 31, 1920, the book value of the plant increased to \$9,776.10 on December 31, 1927. We have made a tentative check of this latter value from unit costs in our files and it does not appear to be excessive.

[1-3] The question of the method of financing the plant in question has been raised, it being contended the rates have been so excessive that extensions and additions to the fixed capital account have been made out of earnings instead of from funds derived from the sale of stock or bonds and that the company has in addition earned regular dividends. Examination of the income accounts and balance sheets, filed during the period the utility has been in existence, indicates that it has averaged 9.25 per cent on the book value per annum. It is questionable whether the utility has financed construction entirely out of earnings. Current assets offsetting the reserve for depreciation can be used temporarily for additions or extensions to fixed capital. During the period examined the total amount reserved for depreciation or retirement exceeded the construction by over \$850.

There appears to be little question that the utility has been operated economically as regards the annual amounts expended for operating labor and general officers' salaries and no doubt this partially accounts for an average annual earning in excess of the normal return a utility is entitled to. The profits on wiring installations and electrical merchandising business during the early years of the utility's existence appear to have aided materially in building up the amounts available for dividends and P.U.R.1928E.

new construction. An inspection of the system indicates that considerable deferred maintenance which must eventually be taken care of has tended to keep down operating expenses.

A comparison of the rates in Boscobel with those in Wauzeka was suggested at the hearing. The sale of energy in Boscobel for 1927 totalled 254,527 kilowatt hours out of 314,300 kilowatt hours purchased. The Wauzeka Light & Power Company bought 56,295 kilowatt hours and sold about 42,785 kilowatt hours of which power customers used 11,985. On the basis of the energy bought and sold there is practically no comparison as the energy requirements of one community were over five times as much as the other.

If we assume the Wauzeka Company had purchased the energy required in 1927 under the terms of the Boscobel contract, it appears the cost of operation would have been increased about \$385. It is evident, therefore, that the terms of the agreement under which energy is being purchased at Wauzeka are more favorable for a small wholesale customer than the demand and energy rates noted in the Boscobel contract.

Such utility service as electric heating and cooking, refrigeration and power cannot be developed to any extent under schedules such as have been in effect in Wauzeka. From the record it appears that if the Interstate Power Company bills the Wauzeka Light & Power Company for all energy used for heat and refrigeration purposes at the power rate, a saving of about two cents per kilowatt hour will result which can be passed on to the customers. This proposed change in billing, it is believed, should be carried out.

We have made an examination of the books and records of the utility for the purposes of checking normal operating expenses and securing customer data upon which to promulgate a revised schedule of rates. From the analysis made we are of the opinion that the schedule as set forth in the order appended hereto will be equitable, both to the utility and to the customers.

P.U.R.1928E.

MISSOURI PUBLIC SERVICE COMMISSION.

W. A. PARKER

v.

ST. JOSEPH WATER COMPANY.

[Case No. 5716.]

CITY OF ST. JOSEPH

v.

St. JOSEPH WATER COMPANY.

[Case No. 5800.]

Service — Meters — Definition of premises.

1. A water company in construing a rule requiring more than one minimum charge where more than one premises are supplied through the same meter may reasonably interpret the word "premises" as being a building or portion of a building occupied by separate tenants or consumers, rather than the land, including the buildings thereon and the appurtenances thereto, p. 170.

Rates — Minimum charge — Number of outlets — Size of meter.

2. A minimum charge for a metered water rate should be based upon the size of the meter in service, rather than upon the number of outlets on the premises to be supplied, p. 170.

Rates — Minimum charge — Customers with abnormal demand.

3. Customers whose demands are greater than the average should pay a minimum charge that will reflect the difference in the expense between the large customers and the smaller customers, p. 170.

Rates — Minimum charge — Number of outlets.

4. The practice of basing the minimum charge for a metered water rate on the number of outlets on the premises to be supplied was held to occasion complaint and misunderstanding and was ordered to be discontinued, and the size of the meter was used as a substitute basis, p. 171.

Rules — Water — Misrepresentation in application.

5. A water company's rule permitting it to discontinue service to patrons charged with misrepresentation in their application for the same, or of wasting water, and providing for resumption of service after such discontinuance upon a payment of money to be determined by the company, was held to be unlawful and unreasonable, and was ordered either to be eliminated or modified, p. 172.

Fines and penalties — Resumption of service after misrepresentation — Water.

6. A water company upon resuming service after a justifiable discontinuance, because of misrepresentation by patrons, can make no P.U.R.1928E.

additional charge except what is sufficient to cover the loss sustained by reason of the misrepresentation or the misconduct, p. 172.

Service — Rules and regulations — Construction of utility rule.

7. All public utility rules should be couched in plain language, the meaning clearly expressed, and should be applied justly and fairly, p. 172.

Service — Discontinuance — Honest dispute.

8. In no instance should service be discontinued because of a matter that is in dispute between the customer and the company, pending a determination of the controversy in the proper forum, p. 172.

Reparation — Commission jurisdiction — Overcharges.

9. The Commission has no power to compel a utility to make reparation and restitution to its patrons for money arbitrarily or unjustly collected, p. 173.

Rates — Water — Vacant premises.

10. A rule of a water company providing for full minimum charges to premises constructed for two tenants regardless of whether one be vacated or not, was held to be unreasonable, and the company was required to file a new rule remitting the minimum or flat charge to premises vacant for a period of thirty days or more, p. 173.

[September 1, 1928.]

COMPLAINT by water customer against rules for service; rules ordered to be revised.

Ing, Commissioner:

Statement:

These cases originated on the complaints of W. A. Parker of St. Joseph, Missouri, and the city of St. Joseph. W. A. Parker alleged in his complaint that he has resided for nine years in the city of St. Joseph; that during all of that time he has been a customer of the St. Joseph Water Company; that he has paid to said company the assessed water rate quarterly, and that he has receipts in full for service to January 1, 1928. Complainant further alleges that on January 1, 1928, said water company rendered to him an excessive bill for the first quarter of 1928, to-wit \$13.05 and informed him that his future rate was to be \$5.05 per quarter; that he tendered said new rate, \$5.05 in lawful money to said water company but said water company refused to accept the same and on February 11, 1928, said St. Joseph Water Company shut off the supply of water to complainant's residence. Complainant further states that he be
P.U.R.1928E.

lieves he is being unfairly treated and that said company is unjustly refusing service to him and his family. Wherefore, complainant asks an order of the Commission that said water service be at once rendered to his home at 602 Thompson street in the city of St. Joseph, Missouri, and that an investigation of said company be had.

The city of St. Joseph alleged in its complaint that the rates for water and the rules and regulations contained in its schedule on file with the Commission are unjust, unreasonable, and unjustly discriminatory; that by said schedule and said rules and regulations undue and unreasonable preference is granted to certain patrons of said company and to particular classes of service, and that other patrons and other classes or kinds of service are subjected to unreasonable prejudice and disadvantage. Complainant alleges that the rules and regulations contained in the defendant's schedule provide that where two or more premises are supplied through one meter the minimum rate shall apply to each premise; that said provision is unjust, unreasonable, and unjustly discriminatory and works a hardship upon a group or class of patrons who can ill afford to suffer such discrimination; that said water company interprets and enforces said rule in an arbitrary and unreasonable manner, and charges for water service an amount in excess of that allowed by law or by the order of this Commission.

The complainant further avers that the term "premises" as used in said regulations means the land, including the buildings thereon and the appurtenances thereto, but that the water company unjustly and unreasonably interprets said term to mean part or parts of the building and the rooms thereof and unlawfully applies said minimum rate to parts of the building and to the separate rooms thereof. Complainant further alleges that said rules and regulations provide that where water is supplied to several parties or tenants on one connection and the supply is controlled by one stop box, the company shall contract with only one of the several parties and will cut off the water from all patrons served from said connection on the failure of said party to abide by said rules and regulations, and that full schedule rates will be charged to the entire premises as long as P.U.R.1928E.

water is turned on. Complainant states that said regulation, as interpreted and enforced by the water company, is unjust, unreasonable, discriminatory, and unjustly prejudicial to patrons of said company; that said rule is unjust and unreasonable in permitting said water company to charge and collect for water service in cases where premises are vacated and unoccupied for long periods of time, and that said water company charges the full amount in such cases and threatens to turn the water off unless such charges are paid, all to the great injury and inconvenience of all patrons served by said connection.

Complainant further states that said rules and regulations provide that in case of willful misrepresentation on the part of any person or for willful or unreasonable waste of water, the supply will be stopped unless the party shall pay such additional charges as the company may impose, which complainant alleges is unjust and unreasonable. Complainant further states that said rules and regulations provide that where premises are vacated they should be excepted from the full amount of rates but that said water company arbitrarily and unlawfully and in violation of said rules and regulations refuses to make proper deductions in charges where premises or parts thereof are vacated, and charges and collects the full amount of the charge irrespective of whether said premises or parts thereof are occupied or vacant; that said water company arbitrarily refuses to make any deductions in charges in cases where boarders and lodgers have moved from rooms and parts of premises but proceeds to collect the full amount of the charge as though said rooms and parts of said premises were occupied. Complainant further states that said rules and regulations are silent with respect to charges to be made in cases where a part of a premise or tenement served by one meter is leased or used for light housekeeping purposes, but that said water company arbitrarily and unlawfully makes a minimum charge to each part or room of said premises or tenement; that said rules and regulations provide that for private houses where not more than four boarders or lodgers are kept, to the total family rates for each regular boarder shall be added \$1.50 per annum; for each table boarder 72 cents per annum, and for each roomer or lodger 42 P.U.R.1928E.

cents per annum. Complainant avers that said rule is unjust and unreasonable in that it discriminates against boarders and lodgers and the keepers of premises where they live without taking into account the number of persons comprising the family, and that the water company arbitrarily and unreasonably, and in violation of said rules and regulations charges a minimum rate of \$1.50 per annum for each boarder or lodger kept in private houses.

Complainant further states that the water company arbitrarily and unlawfully requires its patrons to pay a large sum of money as back bills claimed to be due said company because of a readjustment of the fixtures in the premises overlooked by or not reported to said company, under penalty of stopping the supply of water to said patrons unless said back bills are paid, and that said action of said company is unjust and unreasonable and in violation of said rules and regulations, and that many of the company's patrons have paid such unjust charges rather than suffer the discomfort and inconvenience of having their water supply discontinued.

Complainant further states that the water company, in disregard of its rules and regulations, refuses when requested by its patrons to install water meters except when said company considers it would be to its own interest so to do.

Complainant further alleges that under the rate schedule now in force the charge for patrons supplied by meter service is determined by the number of gallons of water consumed per month; that the monthly bills rendered by said water company do not show the number of gallons consumed but set out the consumption in cubic feet; that by reason thereof said bills are misleading and cause confusion among the company's patrons. Complainant, therefore, prays the Commission to modify the rule permitting the charge of the minimum rate to each of two or more premises served by one meter so that there should be one minimum charge for each meter and not for each premise; to declare the term "premises" to mean the land, including the buildings thereon and the appurtenances thereto and not parts of a building or separate rooms thereof; to require the water company to make proper deductions in cases where premises or P.U.R.1928E.

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parts thereof are unoccupied or vacant and ascertain and determine the fair method of computing such allowances; to prescribe such rule as may be deemed fair and reasonable, denying the water company the right to turn off the water supply of the patron pending the settlement of a controversy relative to rates; to prohibit, under such terms as may be deemed just, the water company from charging and collecting back bills for water service unless such charges are made and presented to the consumers within a reasonable time after the water was supplied; to require the water company to make reparation and restitution to its patrons of all money arbitrarily and unjustly collected, and to install water meters when requested by patrons and to print its monthly bills so that they show on their face the amount of water in gallons for which the charge is made and to make such other orders and grant such other relief as the Commission may deem just and reasonable.

The St. Joseph Water Company in due time filed a motion to dismiss an answer in this cause. The Commission is urged to dismiss the complaint herein for the following reasons:

Because rate schedule P. S. C. Mo. No. 5, the schedule of the defendant complained of by complainants, was approved by the Public Service Commission of Missouri and ordered effective January 1, 1926, after a hearing before the Commission in Case No. 4281, P.U.R.1926B, 76, in which case the city of St. Joseph and the St. Joseph Water Company were parties, and because said case was taken to the circuit court of Cole county on certiorari, which court entered an order upholding and sustaining the findings of the Public Service Commission in said case, and because said order of the circuit court of Cole county was appealed from by the city of St. Joseph and said case is now pending before the supreme court of the state of Missouri, and that in said case the supreme court of Missouri is being called upon to pass upon the reasonableness of said schedule. The defendant alleges that by reason of the facts set forth the Public Service Commission is without jurisdiction to hear the complaint herein.

The answer of defendant is to a considerable extent a repetition of the statements and allegations contained in the motion P.U.R.1928E.

to dismiss and further alleges that the rules complained of are reasonable and should be retained. Defendant denies that it is violating any of the rules on file with the Commission, and that it deals with its patrons justly and in accordance with its rules on file.

This case was heard by a Commissioner at the city of St. Joseph on the 5th day of June, 1928, and the issues in said cause were very materially simplified by a stipulation agreed to and signed by R. M. Duncan, city counselor of the city of St. Joseph and attorney for William A. Parker, and by R. A. Brown for and on behalf of the St. Joseph Water Company. Said stipulation so signed is as follows, to-wit:

"It is hereby stipulated by and between the city of St. Joseph and William A. Parker, complainants, and the St. Joseph Water Company, as follows:

"1. That where water is supplied to several parties or tenants from one service connection the full schedule of rates is charged to the entire premises as long as water is turned on, where the company contracts with one person as owner, lessor, or lessee of the premises, whether water is supplied under the flat rate schedule or through meter, no allowance is made for vacancies in any of the premises so supplied.

"2. Where the water company's inspection shows that a consumer has paid less than the schedule of rates as applied to the fixtures and rooms then found, the company bills the consumer for the amount which the consumer should have been charged according to the schedule of rates applicable to size of premises and fixtures for a period of one year and makes the charge retroactive for that period, unless upon investigation it is found by the company that the charge should have been for a lesser period than one year, in which event the charge is made for such lesser period as the facts disclose. In at least one instance, (namely, William A. Parker) such retroactive charge has been made for a period of two years, and upon failure of consumer to pay such amount the service to the consumer was discontinued after notice had been given, notwithstanding the consumer had paid and the company accepted the amounts shown in the statements rendered by the company to the consumer prior to the reinspection by P.U.R.1928E.

the water company, and the company would not accept the amount for the current period without the payment of the amount charged for the retroactive period.

"3. Where one house, not an apartment house or duplex, or double house is occupied by more than one family and served with but one meter or water service, the company charges a minimum meter rate for each family occupying such house and continues to make such charge even if temporarily vacated by one or more of such tenants and after notice to the company.

"4. The water company charges the multiple minimum meter rate where a dwelling and storeroom or living quarters are connected although the store building has no water fixtures or water service connections, such meter minimum being predicated on the flat-rate charge on such premises. Where two or more premises are served through one service and through one meter, the meter minimum is applied to each of such premises so supplied, and such charge continued as long as water is being served to one or more of such premises.

"5. The water company interprets premises as being a building or a portion of a building occupied by separate tenants or consumers.

"6. The water company requires a meter deposit of \$5 from water consumers unless the consumer owns the premises or guarantees the bill for the tenant. The approximate amount of such deposit now on hand is \$17,000. The deposit plus interest at the rate of 6 per cent per annum is returned to the consumer upon discontinuance of service.

"7. The water company installs meters at its own expense whether installed at the instigation of the consumer or on its own initiative. No deposit is required where the meter is installed by the company on its own initiative to a consumer who has theretofore been using water at the same location and paying for the same based upon a flat rate. The \$5 deposit is based upon the installation of what is nominally known as a $\frac{5}{8}$ -inch
P.U.R.1928E.

meter and the deposit is proportionately larger for meters of larger size.

"City of St. Joseph,

"By R. M. Duncan, City Counselor, and
Attorney for William A. Parker.

"St. Joseph Water Company,

"By R. A. Brown,
G. H. Dickey, Attorneys."

The defendant had in use in the city of St. Joseph approximately 5,600 meters in 1926 and at the time of the hearing the number of meters was approximately 7,100. The total number of water consumers at the time of the hearing was stated to be approximately 17,300, of which number approximately 10,200 were served on a flat rate.

The average cost per annum of reading meters for the years 1925, 1926, and 1927 was \$.701.

The cost of the installation of a five-eighths inch meter, according to testimony offered by defendant, is, where the meter is installed in boxes at curb, an average of \$19.79 per meter, and where installed in cellars an average of \$11.67 per meter. An exhibit filed by defendant shows that the average maintenance cost per annum per meter for the years 1925, 1926, and 1927 was \$.761, and another exhibit shows that the average cost per annum of removing and resetting meters for the same years was \$.189 per meter.

Mr. C. W. Biggs, chief engineer of the American Water Works & Electric Company, which controls by stock ownership the St. Joseph Water Company, stated that each premise supplied through one meter is charged at the minimum based on the flat-rate charge if the flat rate charge is less than \$1.20 per month or \$14.40 per year. He further stated that there is a saving to the company for not having a meter on each of the premises which are now supplied through one meter of \$3.22 per year.

The defendant now applies the same minimum charge to each customer whether the service is furnished through a meter or by flat rate. The flat rate charge is based upon the number of faucets or outlets on the customer's premises, and the number

of consumers. The minimum charge, often referred to as the minimum meter charge, is in fact the minimum charge made by the defendant for being prepared to furnish water service to a customer whether the service is measured by meter or on the basis of the quantity of water supplied through a certain number of outlets on the premises.

Conclusions:

[1-3] In determining the issues of this cause, we will first consider the complaint in regard to the minimum charge for service furnished two or more customers through one meter. The rules of the company on file with the Commission authorize the defendant to apply the minimum charge to each consumer, said rule being as follows:

"Meter Rates—Subject to the minimum monthly or quarterly charges for the respective meters and service, as elsewhere set out herein. Where two or more premises are supplied through one meter the minimum rate to apply to each premises."

The water company construes the word "premises" as being "a building or a portion of a building occupied by separate tenants or consumers." Complainant, city of St. Joseph, contends that this definition is wrong and asks the Commission to declare the word "premises" to mean "the land, including the buildings thereon and the appurtenances thereto." This question has been raised before Public Service Commissions on many occasions, and there is no uniformity of ruling thereon. This Commission does not regard the definition used by defendant as being unfair or inequitable. As an illustration, if a water customer owns an apartment house, apartments of which he rents out, a group of cottages or bungalows, which he also rents, and his own home which he occupies; and if each apartment, cottage, bungalow, and home is occupied by a water company customer, and they are all served water that is measured by a meter having a minimum charge based on the size of the meter, there will be no discrimination, except for the fact that it costs less per customer to serve water to two or more customers through one meter than it does to serve one metered customer. The main trouble in applying the rule in this case, however, lies in the fact that the metered rate, as heretofore stated, is based upon
P.U.R.1928E.

the number of outlets for water and consumers on the premises and not on the size of the meter. There can be no doubt that customers whose demands are greater than the average cause the water company greater expense to serve, and consequently should pay a minimum charge that will reflect the difference in the expense between the larger customers and the smaller customers. That charge can be based on the size of the meter used to measure service or the number of outlets on the customer's premises to be supplied, but the better method is to base the charge on the size of the meter. Customers do not take their full demand on the water system at the same time, therefore, there is a large diversity in the use of water between the various customers. If water service is furnished to more than one customer through the ordinary meter at service connection, the diversity in the use of water between those customers and the capacity of service connection with the meter will enable each of them to secure reasonably satisfactory water service. The company is applying the minimum charge to each customer regardless of whether the service is furnished through an individual or separate service for each customer, or whether two or more customers are served by the same service line. In other words, two or more customers are furnished service through one service line and the amount of water is measured through one meter and a minimum charge is made against each customer as though a separate meter was furnished for each.

[4] The practice of basing the metered rate on the number of outlets is the cause of most of the complaints in this case and the establishment of a rule basing the charge for metered service on the size of the meter, and the number of premises served through one meter will, as heretofore stated, eliminate most of the causes for complaint. A rule should be filed with the Commission by the defendant providing for the regulation of metered rates based on the size of the meter and the number of premises served by one meter, and providing for a minimum charge for each size of meter. When that is done there will be no occasion for worry or complaint in regard to the number of persons occupying a premise.

The difference between the cost of serving a customer occupy-
P.U.R.1928E.

ing a premise served by an individual meter, and customers occupying premises, two or more of which are served by one meter, is \$3.22 per year for each customer in excess of one, that is to say, it costs \$3.22 per year less to serve each premise of a group of two or more, in excess of one, which are served through one meter, than it costs to serve a premise or customer, or customers occupying a premise served by one meter, a difference of approximately twenty-five cents per month. It appears, therefore, that the minimum meter charge per premise when only one premise is served should remain \$1.20 per month, but that the minimum charge for each premise in excess of one, when two or more premises are supplied through the same service and meter should be 25 cents per month less than the minimum that is applied to a single premise supplied by one service and meter. The application of this rule will eliminate the discrimination that now exists.

[5-8] It is charged, and the testimony shows that the defendant discontinues water service to patrons who are charged with misrepresentation in their application for service, or of being guilty of waste of water, and that such customers are required to pay whatever amount the defendant requires him to pay for water service which, according to the schedule of rates, or the judgment of defendant, defendant finds should have been paid, such charges being made retroactive. A reading of the rule will disclose that it should either be eliminated or modified. Without quoting the exact language of the whole rule, it provides that the applicant must file an application and must state fully and truthfully the purposes for which water is required, and follows with this language:

"In the case of willful misrepresentation on part of the applicant, or for willful or unreasonable waste of water, the supply will be stopped unless the party shall pay such additional charges as the company may impose."

There appears no good reason why the rule should be so broad as to permit the defendant to impose any additional charge it may desire to impose and the customer compelled to pay said amount or be deprived of water service. The rule is unreasonable and should be amended or eliminated. There should be no P.U.R.1928E.

additional charge except that which would be sufficient to cover whatever loss the defendant may have sustained by reason of the misrepresentation or waste of water. It is admitted in this case that the complainant, Parker, was deprived of water service because he refused to pay a sum of money which defendant imposed as being the amount due it for water service covering a period of two years. Such harsh application of defendant's rule is not calculated to create proper public relations nor to help maintain or develop defendant's business. The rules of the defendant are in several respects calculated to create discontent among its customers and disturb defendant's public relations, and the application of the rules have in some instances been unnecessarily harsh. All public utility rules should be couched in plain language; the meaning clearly expressed, and should be applied justly and fairly. Mr. Parker's water service should be immediately restored, and if the defendant is still of the opinion that he owes it any amount for service heretofore rendered and refuses to pay therefor, the courts are the proper forum to settle such controversy. In no instance should service be discontinued because of a matter that is in dispute between the company and the customer. If defendant does not restore Mr. Parker's water service under its existing rule, it will be required to do so under the rule provided for by this order.

[9] The request of the city of St. Joseph that the Commission require the defendant to make reparation and restitution to its patrons for "all money arbitrarily and unjustly collected" will be denied for the reason that the Commission has no power so to do. If there are any sums of money due patrons of the water company from defendant which may have been arbitrarily and unjustly collected, the recovery of same can be had only in a court of law.

[10] With reference to the complaint that the defendant continues to make a minimum charge for water service after premises have been vacated, it appears that Rules 4 and 13 might be applicable. Rule 4 is as follows:

"In all cases where water is to be supplied to serve parties or tenants, from one connection, with supply controlled by one stop box, the company contracts with one owner of said several P.U.R.1928E.

parties, and on his failure to abide by said rules and regulations, water will be cut off. Full schedule rates will be charged for water service to the entire premises so long as water is turned on."

It appears that this rule authorizes the defendant to charge for each of the premises where two or more are jointly served, so long as water is turned on, whether the premises be vacated or not.

Rule 13 provides as follows:

"Although water rates are collected quarterly, the manner of such collection is not intended to imply that the rates are quarterly; on the contrary the rates are annual; therefore, persons paying for a term less than a year are informed that they will be held for the full annual rate, the only exceptions being where premises are vacated or where a contract may be made for less than year, in which case, if such term is less than six months, the rate shall be paid in one payment in advance."

It will be noted that Rule 13 provides that customers are exempted from paying the full annual rate if the premises are vacated. It cannot be said that this rule applies only to premises that are served by one meter, for it must apply to all premises whether there be more than one premise served by a single meter or whether it is one premise served by meter, or if the premises are on a flat rate.

It is the opinion of the Commission that this rule is unreasonable and that the defendant should file a rule providing that when premises are vacant for a period of thirty days or more, the minimum meter charge or flat rate charge should not be applied to such vacant premises.

The Commission is of the opinion that it would be very helpful to the defendant company if it will immediately, or as soon as possible, file with the Commission service rules containing the suggestions of the Commission in this report, and will require same to be filed. The Commission finds that defendant's motion to dismiss should be overruled, for the reason that Case No. 4281, P.U.R.1926B, 76, now in the supreme court on appeal, is a rate case, and the issues there raised are not the same as the issues of this case.

An order in accordance with the views herein expressed will be issued.

Brown, Chairman, Porter and Hutchison, Commissioners, concur; Calfee, Commissioner, absent.

MISSOURI PUBLIC SERVICE COMMISSION.

CITY OF DEARBORN

v.

MIDWEST TELEPHONE COMPANY.

[Case No. 5783.]

Discrimination — Duty of Commission — Telephone — Free interexchange.

1. It is the duty of the Commission in determining whether or not free interexchange telephone service should be re-established between certain points to take into consideration the interest of all of the telephone patrons regardless of their occupations and to find that the proposed service would be a benefit to the patrons generally, and not to a privileged fraction having need of such communication, p. 182.

Orders — Force of Commission orders — Free interexchange.

2. A Commission order recognizing the existence of free telephone service between certain points cannot be construed as an order directing that such service should continue to exist, p. 183.

Reparation — Telephone rebates — Commission jurisdiction.

3. The Commission is without power to require a telephone company to pay rebates on tolls collected from patrons at different exchanges upon the discontinuance of free service, p. 183.

Rates — Free interexchange — Prospective revenue — Telephone.

4. The re-establishment of free telephone service between exchanges a short distance apart which had been discontinued upon the destruction of direct facilities, due to causes beyond the control of the company, was denied where the prospective revenue did not warrant an order requiring the installation of a direct line, and where there was no proof that the general public required such facilities, or that the re-establishment of such service would not result in unreasonable discrimination in favor of those who had need of it, p. 183.

[August 30, 1928.]

COMPLAINT of the mayor of a city against discontinuance of free interexchange telephone service; complaint dismissed.
P.U.R.1928E.

Ing, Commissioner:

Statement:

This case comes to the Commission on the complaint of the city of Dearborn, a city of the fourth class located in Platte County, against the Midwest Telephone Company. Complainant alleges that the Midwest Telephone Company, after its purchase late in 1927 of the Dearborn Telephone Company, discontinued free telephone exchange service between Dearborn and Camden Point and between Dearborn and Platte City, Missouri; that when the Public Service Commission granted the last increase in rates to the Dearborn Telephone Company it was made a provision of said increase that a patron of the Dearborn Telephone exchange would be entitled to free exchange service with each and all of the exchanges at Edgerton, Camden Point, and Platte City, but that the Midwest Telephone Company has allowed the line between Dearborn and Camden Point to be taken down and free exchange telephone service between said cities to be discontinued.

Complainant further alleges that Camden Point is only six miles from Dearborn, yet by toll it is necessary to go 22 miles to St. Joseph and then back 28 miles to Camden Point, or a total distance of 50 miles; that this takes much time and causes great inconvenience and dissatisfaction; that much of the territory on the Camden Point exchange lies between Dearborn and Camden Point and has a business connection with Dearborn, and that this rupture of service is a serious matter to Dearborn business men, adversely affecting their business and trade territory.

Complainant asks that the Public Service Commission order the Midwest Telephone Company to immediately restore free exchange service between each and all of the said exchanges of Dearborn, Edgerton, Camden Point, and Platte City, or if such restoration of service is not justified, that all tolls collected for service between said exchanges be rebated from the monthly bills as presented and said tolls be absorbed by the Midwest Telephone Company, or if such rebating of tolls is not proper, that the schedule of rates be properly reduced to provide for a two-exchange charge instead of a four-exchange charge. Com-P.U.R.1928E.

plainant further requires that the Commission order the said Midwest Telephone Company to rebate to all patrons all tolls collected from Dearborn exchange patrons on calls from Dearborn to Camden Point and from Dearborn to Platte City on which tolls have been charged since the discontinuance of said free service, as such discontinuance, complainant alleges, was unlawful, in direct conflict with a previous order of the Commission and was done without the knowledge, authority or permission of the Public Service Commission.

The Midwest Telephone Company in due time filed an answer to said complaint, in which said answer defendant denies that it owns or operates the telephone exchange at Camden Point; denies that it was made a provision of the order of this Commission that the Dearborn Telephone Company, the predecessor of this defendant, should provide free telephone exchange service for its subscribers at Dearborn, Camden Point, and Platte City; or that it has been required by any order of this Commission to render free exchange service to the telephone subscribers of the Dearborn exchange. Defendant alleges that the distance between Dearborn and Edgerton is approximately ten miles and that it is now rendering free connecting line service between the exchanges of said points; that the distance between Dearborn and Camden Point is approximately six miles, and that prior to the acquisition of the Dearborn exchange by defendant, the owners of said exchange, by means of the unauthorized appropriation of the use of two unused circuits on the long distance line of the Southwestern Bell Telephone Company between Dearborn and Camden Point, rendered free service to Camden Point for the subscribers at Dearborn; that recently said Southwestern Bell Telephone Company has required the use of all the pin spacing on the pole line above mentioned for its long distance service between Omaha and Kansas City and between other cities, and has removed the circuits so appropriated by the Dearborn Telephone exchange and thereby made it impossible for defendant to render connecting line service between the Dearborn and Camden Point exchanges except by the building and maintenance of entirely new pole lines and appurtenant equipment between said cities;

that the distance between Dearborn and Platte City is approximately thirteen miles and that defendant is informed that the Dearborn Telephone Company maintained a free connecting line between Dearborn and Platte City prior to the time that defendant acquired the Dearborn exchange; that such free connecting line was destroyed by a sleet storm before its acquisition by defendant; that the distance between Platte City and Camden Point is approximately eight miles and defendant maintains a free connecting line between the exchanges at said points; that the distance between Platte City and Weston is approximately seven miles and defendant maintains a free connecting line between the exchanges at said points.

Defendant further avers that if it be required to build and maintain connecting lines between the Dearborn and Camden Point exchanges and render free telephone service over said lines, it will result in the overloading of its lines and systems and will interfere with and hamper defendant's ability to render adequate telephone service to its patrons at Dearborn and will impose additional cost and expense upon defendant to an extent which will make its telephone service and business unprofitable and non-compensatory. Defendant further avers that the rates for exchange service now effective at Dearborn do not and will not produce sufficient revenue to pay the cost of operation of such exchange, an amount for return and depreciation reserve, and provide any compensation for the building and maintenance of connecting lines to other exchanges and the rendition of free service over said lines. Defendant further avers that it is ready and willing to build and maintain new toll lines of standard type and construction between Dearborn and Camden Point and Dearborn and Platte City if it is authorized to make effective, reasonable, and adequate toll charges for the use of said lines so that a fair return on the investment in said lines may be earned and so that the lines for exchange offices of defendant will not become overloaded by excessive and unlimited free use.

This case was heard by a member of the Commission at the city of St. Joseph on the 5th day of June, 1928. Briefs were filed by both counsel for complainant and defendant.

P.U.R.1928E.

Facts:

Dearborn is a city of the fourth class and is located approximately twenty miles south of the city of St. Joseph, in Platte county, and has a population of 578, according to the 1920 census. Edgerton is located about nine miles southeast of Dearborn and has a population of 558. Camden Point is located about six miles south of Dearborn and has a population of 212, and Platte City is the county seat of Platte county and is located about 12 miles south of Dearborn and has a population of about 500. The Midwest Telephone Company owns the telephone exchanges at Dearborn, Edgerton, and Platte City, said exchanges having been acquired by purchase from the Dearborn Telephone Company approximately one year ago. The Camden Point Telephone Company is owned by Mr. Edward Linney and neither he nor his company were parties to this proceeding.

At the time the defendant acquired the Dearborn Telephone property, the Dearborn Telephone Company was furnishing free service to subscribers at Dearborn over a telephone circuit of the Southwestern Bell Telephone Company between Dearborn and Camden Point, the use of said circuit between said cities having been discontinued by said Southwestern Bell Telephone Company, the wires still remaining on its poles. These wires were utilized for exchange purposes by the Dearborn Telephone Company and the owner of the telephone exchange at Camden Point, by connecting said wires with their respective exchanges. Before the defendant acquired said telephone property, the Southwestern Bell Telephone Company resumed the use of its said circuit between Dearborn and Camden Point and detached the connections of the Midwest Telephone Company at Dearborn and those of the Camden Point Telephone Company at Camden Point. Prior to the acquisition of said telephone property by the defendant, there was maintained grounded line circuits between Dearborn and Platte City over which free service was rendered between said cities. The testimony shows that this line was destroyed by a sleet storm approximately a year before the defendant acquired said property. Both Platte City and Edgerton have free telephone connection with Camden Point, and Edgerton also has free connections with Dearborn and Platte City. The service at Dear-P.U.R.1928E.

born is partly metallic and partly grounded, the greater number of patrons being served with grounded line service.

Mr. F. E. Jeffries of Dearborn, Missouri, stated that he was in the telephone business for nineteen years; that he formerly owned the telephone exchange at Dearborn and about two years prior to the time of the hearing sold said property to Mr. A. J. Roberts. Mr. Jeffries stated that it would not be practicable to give telephone service between Dearborn and Camden Point by way of Edgerton, for the reason that it is hard to give service upon a grounded line for that distance. Mr. Jeffries further stated that the only method of restoring telephone service between Camden Point and Dearborn will be by building a trunk line between said cities or by removing all subscribers from two party lines between said stations and using them; that the most satisfactory method would be to construct a trunk line.

Mr. A. R. Gaines, the mayor of Dearborn, stated that he had heard some complaints relative to the service rendered by the defendant, some of said complaints being to the effect that lines were crossed. Another complaint was to the effect that when a ring was made for one party the caller would get someone else. Mr. Gaines stated that the complaints were of various kinds but enumerated only the two mentioned above. He stated that there are calls to Platte City because of the fact that it is the county seat of Platte county; and that there are a considerable number of residents in the vicinity of Dearborn who have telephonic communications with Camden Point.

Mr. E. J. Sanders of Dearborn, Missouri, stated that he is in the paint business; that he has an office at Dearborn and that he has frequent occasion to use the telephone for long distance purposes, his calls usually being through Kansas City. Mr. Sanders stated that the long distance service to Kansas City is bad; that he is usually unable to talk and that his messages have to be repeated. He has had a telephone in his place of business for three months and stated that outside of the long distance messages to Kansas City he has had no difficulty with the service. He stated that the service of his residence phone is fair. Mr. Sanders stated that there is a demand for telephone communication between Dearborn and Camden Point and between Dearborn and Platte
P.U.R.1928E.

City, but that he has more occasion to talk to Camden Point than any other place. Mr. Sanders stated that he sells paint to the farmers in Platte county and that he has a branch office at Camden Point, and that it would be quite an advantage to be able to have free telephone service; that his telephone tolls are probably from 60 to 70 cents per day for Camden Point alone; that he could conduct his business at less expense, and that in his opinion there are other business men who are similarly situated.

Mr. Charles Ferril, a grocer of Dearborn, testified that he has customers residing at Camden Point and that it is necessary for him to telephone them and for them to telephone him, and that it would be helpful in his business to use the line without having to pay a toll charge.

Mr. W. P. Herrington, who resides at Dearborn and is engaged in owning and conducting a Ford agency, stated that he has been in that business for about six years and that he has very little occasion to communicate by telephone with people in the vicinity of Camden Point, and that he had in the last month only four calls to Platte City.

Mr. F. M. Lantz, division superintendent of the Midwest Telephone Company, stated that the defendant is now rendering free service to Edgerton but that is not practicable to render free service between Dearborn and Camden Point through Edgerton over the lines now in use. He stated that he did not feel that his company would be justified in building a line between Camden Point and Dearborn for the purpose of rendering free service. Defendant offered an exhibit which estimates the cost of the construction of a telephone line between Dearborn and Camden Point at \$1,098, and Mr. Lantz stated that a two-wire line would cost \$200 more. The book value of the Dearborn Telephone property was estimated at \$23,259.13. The gross revenues for four months ending April 30, 1928, as shown by an exhibit identified by Mr. Lantz was \$2,095.88. The total expenses for the same period was \$1,552.10. Mr. Lantz further stated that the only means that would give adequate and satisfactory service would be the construction of a new line; that it would not be practicable to use any of the existing farmer lines.

The cost of improvements made in the Dearborn property from P.U.R.1928E.

the 15th of November, 1927, to January 10, 1928, was \$5,001.96. The number of subscribers at Dearborn is 298. Mr. Lantz stated that the use of a free line is detrimental to the service in that it increases the expenses, there being no restriction on the time that can be used by one subscriber, and that actual studies made show that a little less than 15 per cent of the patrons take advantage of the free service. He further stated that the traffic in the central station would increase at Platte City and more operators would have to be employed.

Mr. George O'Rourke, district manager of the Midwest Telephone Company, stated that within the past year said company has made considerable improvements to the Dearborn property including the placing of underground cables, new poles, new overhead wiring, and rewiring all of the houses served. He stated that the distribution system in the town of Dearborn was practically entirely newly built, and that there was a new main frame installed in the switchboard office. He stated that these improvements have resulted in improved service to the public; that the transmission is better, and the cost of maintenance in the city has been lessened. He further stated that he had not been informed of many complaints as to service.

There are about 430 to 440 telephone subscribers at Platte City, about 210 to 215 at Edgerton, and about 150 at Camden Point.

Conclusions:

[1] The question to be determined by the Commission in this case is whether it should, by its order, require the defendant to establish telephone lines between Dearborn and Camden Point and between Dearborn and Platte City and furnish free telephone service over said lines. The testimony shows that free telephone service would be of benefit to business people of Dearborn who have occasion for telephonic communication between said cities, but this Commission must take into consideration the interest of all of the telephone patrons regardless of their occupations. Experience has shown that where free telephone service exists the privilege is always abused by certain persons, and telephone conversations are held for the purpose of visiting and at much greater length than where a toll is exacted, so that those who

have a need for the service often find it impossible to use the telephone for the reason that the line is busy.

Public Service Commissions generally have looked with disfavor upon so-called free telephone service, recognizing the fact that free service does not exist, for although the persons who use the telephone without charge to them may regard it as free, it, of course, must be paid for by telephone users generally. Experience has shown, and the testimony in this case discloses, that less than 15 per cent of telephone patrons avail themselves of the right to the free service. In other words, all of the telephone users must pay for the service that is furnished free to the 15 per cent.

[2] Complainant is in error in its allegation that the Public Service Commission, by order, determined that the free service that had formerly been given by the Dearborn Telephone Company should be continued. No such provision was made by any order issued by this Commission. In its report and order referred to by complainant, Case No. 2740, issued February 18, 1921, the Commission stated that free telephone service existed but there was no requirement that it should continue to exist.

[3] The Commission cannot accede to complainant's request to order a rebate to the patrons of defendant of all the tolls that have been collected from Dearborn exchange patrons on calls to Camden Point and Platte City since the discontinuance of free service to said cities, for the reason that the Commission is without power so to do. The power to require defendant to pay rebates to its patrons lies in another forum. It is a function that can be exercised only by the courts.

[4] There was no showing in this case that would justify this Commission in ordering a reduction in rates. The rates of public utilities are based upon the fair value of the public utility property that is used in the public service, and there was nothing developed in this case on which a reduction could be based.

To require defendant to go to the expense of constructing telephone lines and procuring additional employees in order to accommodate those who would use the proposed free service would not be fair to those patrons who would have no occasion for such service. To do so would be an unreasonable discrimination.

P.U.R.1928E.

The testimony seems to indicate that it would be advantageous to the general public to have direct telephonic communication between Dearborn and Camden Point and between Dearborn and Platte City, and this Commission would look with favor upon the establishment of toll lines between said cities. In many instances where toll lines are established to take the place of free telephone service the telephone patrons find that the service rendered is more satisfactory; that there is not the delay that is found where free service is given; that those who actually need the service are not compelled to wait on continued visiting or idle conversation, but that it is preferable to the free interexchange service.

After a careful consideration of all of the facts in this case, the Commission is of the opinion that the prayer of the complainant should be denied and the complaint dismissed.

An order in accordance with the views herein expressed will be issued. [Order omitted.]

Brown, Chairman, Porter, Commissioner, concur; Calfee and Hutchison, Commissioners, absent.

MISSOURI PUBLIC SERVICE COMMISSION.

CITY OF LEE'S SUMMIT v. INDEPENDENCE WATER WORKS COMPANY.

[Case No. 5882.]

Rates — Water — Load factor.

1. Load factor should be taken into account in figuring a schedule of rates for water service where the amount of the customer's use such as that of a whole city, makes this feature an important one, p. 192.

Rates — Water — Separate reservoir — Load factor.

2. Load factor of nearly 100 per cent obtained by a city maintaining its own reservoir was taken into consideration in apportioning the fixed cost of the water company supplying such city with relation to the rest of its distribution system not having such uniform demand, p. 192.

Apportionment — Water utility — Combined use of booster pump — City supply.

3. The additional expense of supplying water to a county farm
P.U.R.1928E.

was directed to be apportioned in computing the cost of operating a booster pump supplying an elevated city reservoir where such pump also supplied the farm, p. 102.

[August 30, 1928.]

APPLICATION of water company to increase rates; previous order suspending proposed increase made permanent.

By the **Commission:** On April 24, 1928, the Independence Water Works Company filed with this Commission a tariff sheet containing a schedule of rates said company proposed to put into effect for water furnished wholesale to the city of Lee's Summit, Missouri, the effective date as requested being December 1, 1927. Notice was given to the city of Lee's Summit of the filing of the proposed rates and upon receipt of a protest from said city, the Commission suspended the proposed rates in order that it might investigate the reasonableness of the same, the suspension order being issued May 22, 1928, suspending the rates to and including September 19, 1928.

On July 10th the matter was heard at the Commission's hearing room in Jefferson City, Missouri, and the case is now before the Commission for its decision.

The Independence Water Works Company is a corporation that furnishes water service primarily to the city and inhabitants of Independence, Missouri. It also retails water service to customers who reside outside and adjacent to the corporate limits of the city of Independence, and in addition thereto it furnishes water at a wholesale rate to the Jackson county farm and the city of Lee's Summit.

Originally the Independence Water Works Company, herein-after referred to as the Water Company, pumped its water supply from the Missouri river and after purifying the water again pumped it thru its distribution system to its customers. Due to the difficulty in obtaining a satisfactory source of supply from the Missouri river the Water Company made an arrangement and agreement by which it now obtains its water supply from the city of Kansas City, Missouri. The Water Company's connection with the Kansas City water works system is at the east city limits of Kansas City from which point the water is carried thru a 16-inch pipe to the Water Company's reservoir at P.U.R.1928E.

the west city limits of Independence. It appears that the water will flow by gravity from the supply of the Kansas City water works system to the distribution system of the water works company at Independence, but due to operating requirements made by the city of Kansas City, it is necessary for the water works company at Independence to take the water it receives from Kansas City at night and store it in the reservoir mentioned above. It is then necessary to pump the water from the reservoir into the distribution system at Independence. The water then flows from this distribution system throughout the Water Company's territory, including the 6-inch pipe line extending from the south line of Independence to the Jackson county farm, some eight or nine miles away, and thence thru an extension consisting also of a 6-inch pipe to the city of Lee's Summit.

The connection to the Jackson county farm was made near the latter part of the year 1911. Subsequent thereto it appears an agreement was made between the Water Company and the city of Lee's Summit by which agreement the Water Company was to also furnish to the city of Lee's Summit, at a point near the Jackson county farm, water for the city of Lee's Summit, the water being carried thru the aforesaid 6-inch pipe line between the city of Lee's Summit and Jackson county farm, the pipe line from Independence to said farm, as mentioned above, being owned by Jackson county. The 6-inch pipe line between Jackson county farm and Lee's Summit is owned by the city of Lee's Summit.

The rates for water furnished to the city of Lee's Summit now in effect are as follows:

Minimum bill, \$92.10 for which 620,000 gallons may be taken.

For all over 620,000 gallons and up to 1,500,000 gallons, 12½ cents per thousand gallons.

For all over 1,500,000 and up to 2,500,000 gallons, 11½ cents per thousand gallons.

For all over 2,500,000 gallons, 11 cents per thousand gallons.

The water supplied to the city of Lee's Summit was at first forced thru the pipe line between Independence and Lee's Summit by gravity pressure. As the demand for water increased in Lee's Summit, the capacity of the pipe line became insufficient
P.U.R.192SE.

under the static head on the water at Independence to supply the needs of the city of Lee's Summit, and it became necessary for the city of Lee's Summit to install a booster plant near the Jackson county farm and in that way force a greater amount of water thru the pipe line to Lee's Summit.

The elevation of the pipe line at the county farm is something over one hundred feet below the elevation of either Independence or Lee's Summit, thereby providing a suitable location for the booster pump at that farm. The water flows from the pipe line into a reservoir at Lee's Summit. This reservoir will hold three days' supply of water for that city and provides sufficient capacity to allow water to flow at maximum rate possible under any pressure that it may at any time obtain.

The Water Company in filing the proposed schedule of rates states in its letter of transmittal to the Commission that "Pursuant to the order of the Commission in Case No. 5307, dated November 19, 1927, P.U.R.1928B, 193, 'Ordered: 3. That the Independence Water Works Company take immediate steps to relieve the city of Lee's Summit, Missouri, of further expense in the operation of a booster pump,' the Independence Water Works Company on December 1, 1927, took over the operation of the booster pump and since that date it has maintained and operated the booster pump at its own expense and to cover the added cost to this company in carrying out the order of the Commission, we hand you herewith for filing the schedule of rates hereinabove mentioned."

Case No. 5307 just referred to was brought on by a complaint filed by the city of Lee's Summit asking that the Water Company be required to furnish booster pump service necessary to comply with a former order of the Commission, reported in Volume 13 Mo. P. S. C. R. 134. In compliance with the order made by the Commission in Case No. 5307, *supra*, the water works company took over on December 1, 1927, the operation of the booster pump installed by the city of Lee's Summit near the Jackson county farm.

The water works company claims that it has been operating the booster pump since December 1, 1927, and because of the increased expenses in operation of this booster pump, it is en-P.U.R.1928E.

titled to the rates now proposed. Exhibits were filed by the Water Company in support of its claim as to what the additional expenses were for the operation of the booster pump.

The rates it is proposing to put into effect are as follows:

First 1,000,000 gallons per month	20 cents per thousand gallons
Next 500,000 gallons per month	43 cents per thousand gallons
Next 500,000 gallons per month	35 cents per thousand gallons
All over two million gallons	30 cents per thousand gallons

The Water Company claims that the total cost, after delivery in its distribution system at Independence, for 485,000,000 gallons of water, the total amount of water used by it, was \$.1824 per thousand gallons. That figure is arrived at in the following manner:

Total production cost of water	\$51,670.03
$\frac{1}{2}$ of taxes in the amount of \$5,993	2,996.50
$\frac{1}{2}$ of depreciation in the amount of \$11,974.80	5,987.40
$\frac{1}{2}$ allowed return of \$55,693	27,846.50
	<hr/>
	\$88,506.43

The Water Company gives as its reasons for calculating the costs as shown above somewhat as follows:

The production cost includes the amount paid to the city of Kansas City for the water, the expense of transmitting it to Independence, pumping it and putting it in the mains.

The taxes paid for 1927 amount to \$5,993 and the company takes one half of that, being chargeable to the water furnished its various consumers, the other one half to be charged to the investment of its distribution system at Independence because of the added capacity required in its distribution system at Independence to provide fire protection in that city.

Its book depreciation for the year 1927 amounted to \$11,974.84. It again charges one half of that figure to the fire protection afforded the city of Independence, leaving the other one half chargeable to water furnished the other consumers. Then the amount that it claims it is entitled to earn as a return is found by taking 7 per cent of \$795,626.54, its claimed present value of the property as of December 31, 1927, and charging one half of that to fire protection for the city of Independence and the other one half to the other consumers, the other consumers including the inhabitants of the city of Independence
P.U.R.1928E.

and territory adjacent thereto, the county farm and the city of Lee's Summit. The total amount of all the above costs is \$88,506.43, producing a total cost of all the water produced by the Water Company of \$.1824 per thousand gallons. That, the Water Company contends is the cost of the water, including all items of cost of placing the water at the point of delivery to the pipe line supplying the county farm and Lee's Summit.

The Water Company claims that there are some other operating expenses such as legal expenses, rent, etc., which amount to 7.4 mills per thousand gallons pumped, which items of expense amount to so small a cost per thousand gallons that it did not include them in its estimated cost of putting the water in the distribution system at Independence.

The Water Company then claims to the cost of \$.1824 should be added the additional cost it has of operating the booster pump at the county farm, including such items as labor, maintenance, repairs, and electric current. The Water Company states by one of its exhibits filed for the purpose of showing those costs that from data accumulated daily over a two months' period from December 1, 1927, to February 1, 1928, it has found the pipe line between Independence and Lee's Summit will deliver to Lee's Summit without any boosting about a million gallons per month, or 12,000,000 gallons per year. The company claims that this 12,000,000 gallons of water should bear the burden of interest and depreciation on the booster plant even though the booster plant is not needed to supply that amount of water. Allowing interest and depreciation at the rate of $8\frac{1}{2}$ per cent on \$1,500, the estimated value of the booster plant, the annual charge for interest and depreciation on that plant would amount to \$202.50. Spreading that over the 12,000,000 gallons that can be supplied without the booster pump, makes the total cost of that water \$.1994 per thousand gallons, or 20 cents as taken by the Water Company. The Water Company claims that this is the rate that it should charge for the first million gallons of water supplied each month, or 12,000,000 gallons of water supplied each year.

The total amount of water it supplied during 1927 to Lee's Summit is shown to have been 20,442,480 gallons. Of that
P.U.R.1928E.

amount, 12,000,000 gallons were supplied without the use of the booster pump, leaving 8,442,480 gallons that had to be pumped, which water the Water Company claims should bear the burden of the operation of the pump, the fixed charges having been carried in the first 12,000,000 gallons supplied.

The second block of the proposed rates is 500,000 gallons per month or 6,000,000 gallons per year. The total energy cost for the year 1927 is shown to have been \$1,037.50 and the labor charge, which is made up of three hours time daily for one man and a car at a dollar per hour, is shown to have been \$1,095, or a total of \$2,132.50 which was used to pump 8,442,480 gallons. That cost amounts to 24.5 cents per thousand gallons. Since the fixed charges on the booster pump are taken care of by the 1.7 cents added on the first block mentioned above, the Water Company claims that the total amount charged for the water that was pumped during 1927 should be 43.64 cents per thousand gallons and that is how it arrives at the rate of 43 cents per thousand gallons for the next 500,000 gallons per month, or 6,000,000 per year. However, since the second block only takes care of 6,000,000 of the remaining 8,442,480 gallons that were pumped in 1927, 2,442,480 gallons remain to be taken care of in the third step of 500,000 gallons per month, or 6,000,000 gallons per year. The total cost of labor and energy to be charged over to the third block is found by taking 2,442,480 gallons at 24.5 cents per thousand gallons, which figures out \$609.60. That is the sum that remains to be spread over the water used in the third block.

The Water Company then states that the labor charge will not be increased if the annual consumption of water is any greater than it was last year but that the cost of electric energy will increase as the amount of water pumped increases. Therefore, it proposes to take the \$609.60, which was the cost for pumping the 2,442,480 gallons remaining over and above the third block, and add to that \$432 which is the amount required to pay for the electricity used to pump the remainder of the third block of 6,000,000 gallons per year. The total cost of pumping the water then amounts to \$1,041.60, or 17.3 cents per thousand gallons, which includes the cost of 12 cents per thousand

P.U.R.1928E.

gallons for current for pumping the water. Then taking the original cost of the water at 18.24 cents per thousand gallons, and adding to that 17.3 cents, which completes the cost of the labor for operating the booster pump and includes whatever energy may be used, a resultant cost of 35.5 cents per thousand gallons is found, which is proposed in the schedule to be 35 cents per thousand gallons, the rate of the third block.

Then summarizing before going into the fourth block, the Water Company furnished twenty million, four hundred and some odd thousand gallons of water to Lee's Summit last year. It proposes to make the first block 12,000,000, for which it will charge 20 cents per thousand gallons, to cover the production cost plus fixed charges on the booster pump, leaving eight million, four hundred and some odd thousand gallons for the remaining blocks. To that 8,400,000 gallons, it proposes to add the labor and energy cost as would apply to the 1927 consumption, making the rate 43 cents for the second block of 6,000,000. Then there remains 2,400,000 gallons which it would also charge for at the rate of 43 cents, but when thrown in with the third block of 6,000,000 gallons and spread over that block, together with the additional energy used, figures out 35 cents per thousand gallons. That is an amount of water somewhat more than the amount of water used last year.

Then the fourth block for any amount that the city of Lee's Summit might take, adding to the production cost of 18.24 cents per thousand gallons the energy cost of 12 cents per thousand gallons, makes the fourth rate of 30 cents per thousand gallons.

The analysis transmitted by the Water Company shows well enough how the unusual type of schedule was arrived at, but further analysis might show the rates as proposed to be discriminatory or excessive.

To begin with, the water costs the Water Company 8.8 cents at Kansas City. It is then delivered thru a 16-inch main at the applicant Water Company's reservoir. From there it is lifted to higher elevation and distributed to the various consumers. The Water Company proposes to consider the city of Lee's Summit as one of its customers and being charged out one half of its distribution system at Independence to fire protec-

P.U.R.1928E.

tion service at Independence, it arrives at a figure of 18.24 cents per thousand gallons as the total cost of the water, including interest and depreciation, ready to deliver to the customer, and the production cost of the total included in the above amount figures 10.6 cents per thousand gallons.

[1, 2] In its method of estimating the total cost per thousand gallons for the total delivery in the distribution system, including fixed charges, it appears that the Water Company has given no consideration to the load factor of its various customers. Ordinarily, the load factor of average customers is not taken into account in figuring a schedule of rates for water service, but with as large a customer as the city of Lee's Summit, that may be an important feature. The load factor of the service furnished Lee's Summit is very near one hundred per cent, because that city has provided a reservoir for the purpose of enabling the water to flow by gravity continually throughout the twenty-four hours of the day. The Water Company has no other customer who uses its maximum demand in such manner. The city of Lee's Summit even requires more than will flow through the Water Company's distribution system under the pressure provided by the Water Company's system in Independence. That should be taken into account when applying the fixed charges of the distribution system to such customer. For instance, the fixed charges per thousand gallons on a customer who uses full capacity of the pipe line twelve hours a day will be twice the fixed charges per thousand gallons on a similar customer who uses full capacity of the pipe line twenty-four hours a day. No evidence was submitted showing the load factor of the average customer at Independence and since it is as low as 25 per cent, the fixed charges of such customers and a customer like Lee's Summit would be divided on the basis of demand in a ratio of as great as four to one. Therefore, the fixed charges against the city of Lee's Summit would not be greater than one-fourth of the 10.6 cents per thousand gallons proposed by the Water Company to cover fixed costs.

[3] Furthermore, the evidence shows that the booster pump is used to pump water to the county farm as well as to the city
P.U.R.1928E.

of Lee's Summit and it does not appear that any allowance was made for the energy consumed or other cost of boosting the water supplied to the county farm.

The evidence shows that the booster pump is located about twelve hundred feet beyond the point where the county farm supply line is tapped onto the main line, in the direction of the city of Independence. With the booster pump so located that it necessarily boosts whatever water may be allowed to flow to the county farm during the time of operating the boosting pump, consideration should be given to that additional expense in figuring the rates to Lee's Summit.

Aside from the two criticisms we have just made in the application of the cost as proposed by the Water Company, it appears that the distribution of the costs is fair. To arrive at a proper analysis of the fixed charges of the distribution system to be applied would require detailed study of the Water Company's system, including inventory and appraisal of the same, and a knowledge of the amount of water supplied the county farm during the time the booster pump was in operation. Our conclusions are, therefore, that the Water Company is entitled to only a part of the relief it is asking.

We do not understand that it is asking for an increase in its rates except to offset the increase in the expenses it has because it has been forced to operate the booster pump in supplying the water at Lee's Summit. This is shown by the testimony of the general manager of the water works company which reads as follows:

"Mr. Gossett: 'As I understand it, this raise in schedule just takes care of the booster cost?'

"A. 'Yes.' "

Accepting that statement, we cannot see how, if the rates in effect before the Water Company took over the operation of the water pump were fair and took care of the fixed charges of the distribution system at Independence, the operation of the booster pump should increase the fixed charges on the distribution system at Independence. In fact the rates the Water Company now charges for water furnished the city of Lee's Summit were made P.U.R.1928E.

at a time when the amount of water furnished was just about half of that now furnished. An analysis of those rates doubtless would show that a part of the revenue would go to cover operating expenses and the remainder to fixed charges and surplus. As the consumption of water increases, operating costs likewise increase, but the revenue also increases correspondingly. The fixed charges will remain more or less fixed unless there is an increase in capital account. No evidence appears in the case to indicate that there has been an increase in capital account to furnish the increased amount of water to Lee's Summit. Therefore, the Water Company is now receiving much more revenue from Lee's Summit for return on the investment used in furnishing the service than it received when the present rates were allowed. That factor cannot properly be overlooked. Taking into account the increase in revenue available for fixed charges on the plant and distribution system used to serve Lee's Summit due to the increase in the amount of water supplied said city, it appears that the Water Company should readjust its rates charged for water furnished to Lee's Summit accordingly and then add thereto the cost of labor, maintenance on the booster plant, and the energy used for pumping the water, making proper allowance for the amount of water pumped to the county farm.

The Commission, therefore, is of the opinion that the rates as proposed should be denied and that the Water Company should be allowed to submit for approval of the Commission a schedule of rates deduced by readjusting its present schedule of rates for water furnished to the city of Lee's Summit so as to allow the same amount for fixed charges on its plant used in serving that city as was available from the present rates at the time said rates were put into effect, then adding thereto a sufficient amount to cover the increase in the cost of labor, cost of maintenance of the booster plant operated by said Water Company, and the cost of electric current required to operate said booster pump in supplying water to said city of Lee's Summit. Furthermore, the Water Company should also submit data and information showing how it arrived at the schedule it may propose, taking into account the water it boosts to the county farm,
P.U.R.1928E.

pro-rating the expenses between the water supplied thru the booster pump to the city of Lee's Summit and the county farm.

Brown, Chairman, Ing and Porter, Commissioners, concur; Calfee and Hutchison, Commissioners, absent.

Note.—Rates.

I. Regulation by various authorities, 195.

II. Factors affecting reasonableness:

a. In general, 196.

b. Comparisons, 197.

III. Rates of particular utilities:

a. Automobile, 198

b. Electric, 199.

c. Irrigation, 200.

d. Railroad:

1. In general, 200.

2. Particular commodity tariffs, 202.

e. Street railway, 203.

f. Telephone, 205.

g. Water, 207.

I. Regulation by various authorities.

A court can enjoin the collection of rates fixed by public service companies which are unreasonable, and may fix the rates to be charged by its own receiver. *West v. Probst*, No. 1047-3977, — Tex. —, 6 S. W. (2d) 96, May 2, 1928.

The United States Circuit Court of Appeals, in *Cudahy Packing Co. v. Omaha*, No. 7478, 24 F. (2d) 3, Jan. 10, 1928, held that where the city of Omaha was compelled under legislative act to purchase as a whole a water system existing partly in that city and partly in South Omaha, a separate municipality at that time, the authority of the first city to fix rates also conferred by statute, was necessary for the system as a whole regardless of previous unexpired power conferred on the mayor and council of South Omaha to fix rates within their own boundaries.

The United States District Court in *Anchor Coal Co. v. United States*, 25 F. (2d) 462, April 14, 1928, stated: "The Commission, in fixing rates, undoubtedly has the power to require that they be high enough to give the carrier a fair return, that they be not so low as to burden other traffic, and that they do not interfere with the earnings of competing carriers, as by being made lower than the rates upon which such carriers can earn a fair return; but there is neither reason nor law for the proposition that rates may be condemned as too low because of their relation to maximum rates from P.U.R.1928E.

a competing community, where they are actually higher than such rates."

The Interstate Commerce Commission had directed certain carriers to reduce the rates on "lake cargo" from northern territory as compared with shipments from southern fields. The United States District Court held that this action was merely an endeavor to equalize the industrial conditions and to minimize economic and geographical advantages by rate adjustment. The Court disapproved of this action on the ground that the Commission had exceeded its powers, stating: "But it must be manifest that increasing the differential to meet such a situation is not regulation of rates, but regulation of industrial conditions under the guise of regulating rates. It means nothing more nor less than that, because one community is able to produce coal more cheaply than another, and thereby get a large share of the business which has been going to the other, even though paying a considerable differential in freight, the Commission is placing upon it a handicap by increasing the differential in rates and thereby equalizing the advantage which it has in a low cost of production. It matters not what this may be called, it is in essence a regulation of industrial conditions through manipulation of rates." *Ibid.*

II. Factors affecting reasonableness.

a. In general.

The California Commission, in *Re Monroe*, Decision No. 19448, Application No. 13987, March 10, 1928, decided that while the establishment of a comprehensive, equitable, and uniform rate structure governed by a proper classification is to be desired in the interest of the shipping public and authority to adopt any freight classifications, should be denied, where financial statements and figures presented are so conflicting and erroneous that the record totally fails to show a justification for the proposed adjustment.

Increased rates were authorized when the additional revenue sought would not pay a return on the investment, but would equalize rates and relieve applicant of the burden of undue losses on its operation on two divisions. *Re Motor Service Express (Cal.)* Decision No. 19591, Application No. 14002, April 13, 1928.

Commission regulation contemplates that rates be established which, while being fair to the consumer, will permit the employment of adequate equipment and facilities in public service. *Re Henderson County Pub. Service Co. (Ill.)* No. 16874, April 12, 1928.

In commenting upon the duty of a State Commission to readjust intrastate rates to conform with favorable rulings by the Interstate Commerce Commission, the Oklahoma Corporation Commis-P.U.R.1928E.

sion stated: "Oklahoma having received the benefits of the interstate adjustments, can hardly expect to avoid its duty as to necessary intrastate readjustments. The removal of undue and illegal discrimination in freight rates, against which recent legislation of our state has been aimed and a strenuous fight has been waged on behalf of this state, must contemplate generally a common basis of rates both interstate and intrastate. It seems only consistent that this Commission do its part in assisting in bringing about uniformity through an effort to harmonize our state rates with the new interstate basis." Re Leland, Cause No. 8791, Order No. 4379, July 31, 1928.

An increase of rates was permitted for a rural telephone company on application where the same rates had been authorized more than five years previous. The company, however, did not choose to place the same in effect at that time, since it was not probable that the conditions had changed materially since the prior decision, and it would, therefore, be reasonable to suppose that the rates found to be equitable at that time would not be excessive at the later proceeding. Re Freeman Teleph. Co. (Wis.) U-3706, May 26, 1928.

The United States District Court in Anchor Coal Co. v. United States, 25 F. (2d) 462, April 14, 1928, stated: "Where carriers are willing to reduce rates and thus give the public the benefit of a lower cost of transportation, we think that the burden should be upon those who oppose the reduction to show that it should not be granted, and not upon those who offer it to show that it should be. A reduction of rates is ordinarily beneficial to the public, and before it is denied the contrary should be made to appear. Here, it is shown that the carriers voluntarily offered a reduction of rates which would give the public cheaper coal, and we think that the Commission acted upon an erroneous legal theory in requiring that the rates be rescinded, not on the ground that they were shown to be too low, but because they had not been justified by the carriers proposing them."

It was held that the Interstate Commerce Commission had the right to prescribe minimum rates to prevent ruinous rate wars and to guarantee reasonable earnings, not only to the carriers affected, but to competing carriers, who might labor under a higher cost of doing business. *Ibid.*

b. Comparisons.

The California Commission, in commenting upon the consideration of rate comparisons, held that although compared rates yield lower revenue per car mile, when no information is vouchsafed as to the comparative conditions under which the respective services are rendered, it is necessary to review the earnings yielded under the rates assailed in the light of circumstances under which the P.U.R.1928E.

traffic moves. *California Cattlemen's Asso. v. Minarets & W. R. Co.* Decision No. 19890, Case No. 2494, June 13, 1928.

The California Commission held that the exceptional situation and circumstances of a weak line operating at a loss made rate comparisons per mile with movements over standard trunk lines in other sections wholly out of the question. *Ibid.*

Comparison of proposed truck rates with rail and other comparable rates for similar distances and movements is not necessary when the rates sought are not expected to produce a return upon the investment and no competitor is protesting. *Re Motor Service Express (Cal.)* Decision No. 19591, Application No. 14002, April 13, 1928.

A comparison of rates for commodities not of the same general nature, value, and volume of movement is of little probative value in a reparation proceeding. *Van Camp Sea Food Co. v. Los Angeles & S. L. R. Co. (Cal.)* Decision No. 19854, Case No. 2490, June 1, 1928.

Rate comparisons not being based on evidence showing similarity of transportation conditions surrounding the movements of an identical commodity have no probative value and are incompetent in adjusting a reasonable rate for other locations. *Illinois Coal Traffic Bureau v. Atchison, T. & S. F. R. Co. (Ill.)* No. 15196, March 29, 1928.

The Indiana Commission took judicial notice of its records and rates on file in its tariff department in determining that a utility's current rates were exceedingly high. In comparison with other companies of the same size they were much higher than some cities larger than that in which it operated. *Re Decatur County Independent Teleph. Co.* No. 8652, April 1, 1927.

In passing on a rate complaint of an electric company, the Wisconsin Commission made the following statement: "It is apparent that the reasonableness or unreasonableness of a company's rate structure must be determined by a critical examination of the conditions under which the company operates, rather than by a comparison with the rate schedules of another utility which may be doing business in substantially different circumstances." *Himmelmann v. Southern Wisconsin Electric Co.* U-3664, April 14, 1928.

III. Rates of particular utilities.

a. Automobile.

In *Re San Diego Electric R. Co.* Decision No. 19206, Application No. 14230, Jan. 3, 1928, the California Commission said: "Under the present tariff the fares are published as applying between La Mesa, Grossmont, and El Cajon only, although the title page of the tariff reads between San Diego and El Cajon and intermediate points. P.U.R.1928E.

Therefore, the fare schedule of the tariff not corresponding to the title page would not technically permit applicant to serve intermediate points, although in actual practice service has been rendered at the intermediate points during the past eleven years by the former owners, by assessing the fare published to the more distant points. As illustrative of this situation, the present fare from San Diego to Seminole Drive is 35 cents, being the published fare from San Diego to La Mesa. The proposed fares will be measured according to distance, thus creating a fare to Seminole Drive of 20 cents."

Operators of taxicabs desiring to make an hourly charge for a sightseeing service in a vicinity of scenic attraction, were allowed to designate such charge in their tariff for operation in such territory. *Re Buster (Colo.) Application No. 572, Decision No. 1683, April 21, 1928.*

A motor carrier, in *Re Fireproof Warehouse & Storage Co. May 12, 1928*, was requested by the Ohio Commission to publish a schedule of rates as to disclose definitely each charge and the specific service which should be rendered therefor, where the evidence disclosed the fact that the carrier had included in the services furnished for its published transportation charge, the packing of five boxes or barrels when the tariff did not so state. The Commission stated that the statute clearly contemplated that schedules should clearly define every service rendered for a published charge or rate.

Increased automobile transportation rates were authorized upon a showing that the operator of an automobile passenger and express line had earned a net revenue of \$760.78 over a ten-months' period. *Re Russell (Utah) Case No. 723, Jan. 24, 1925.*

The Commission will regard rates which have been established and are in effect on the lines of various bus operators applying for certificates as *prima facie* reasonable in order to handle practically the problem of issuing certificates within a short space of time. *Re Auto Transp. Co. (Wis.) Applications Nos. 108A, 157A, 159A, March 21, 1928.*

The principle of issuing commutation tickets at reduced rates has been universally recognized as sound in order to give the regular rider the natural advantage which his patronage warrants over that of the occasional rider. *Re Middleton-Madison Motor Coach Co. (Wis.) No. 75A, Dec. 19, 1927.*

b. Electric.

It must be recognized that consumers receiving rural service must in equity to all consumers pay some additional charge because of the additional expenditure necessary to serve them above the cost of serving consumers in urban territory. *Re Henderson County Pub. Service Co. (Ill.) No. 16874, April 12, 1928.*
P.U.R.1928E.

ANNOTATION.

The Illinois Commission approved a proposed reduction of rates by an electric company whose rates schedule was found to require some reduction and which the consumers with poor load factor were to pay under the old rate. The new rate was based upon hours' use of the maximum demand. It was especially beneficial to consumers having a high load factor. *Illinois Commerce Commission v. East St. Louis Light & P. Co.* No. 18289, July 25, 1928.

A fixed charge per kilowatt per month imposed as a demand charge on customers using welding machines whose power demand did not exceed ten times the capacity of the machine was held to be reasonable and nondiscriminatory notwithstanding the fact that no charge was imposed on the users of such machine who had high tension service or a motor generator between the machine and the company's low tension line or whose demand was more than ten times the rated capacity of the machine. *Re Burtman Iron & Wire Works (Mass.)* D. P. U. 2789, April 18, 1928.

A complaint against alleged excessive electric rates by a commercial consumer using part of his energy for power purposes was denied where no evidence was given to prove that a combined power and light rate was necessary or that the current rate charged was unreasonable or discriminatory. The Michigan Commission pointed out that if a special rate were made, the consumer would be receiving illuminating energy for a lower rate than consumers who did not also use a portion of their energy for power purposes. *Gilmore Bros. v. Benton Harbor-St. Joe R. & Light Co.* D-2322, July 12, 1928.

The Wisconsin Commission approved of a policy of an electric utility to apply urban rates where there were at least ten rural places closely grouped. In the case of farmers, however, they would have the right to determine whether to be supplied under urban or rural rates. In accordance with this policy the Commission approved of a proposed schedule to apply urban rates to a community having ten customers. *Re Wisconsin Power & Light Co.* U-3735, Aug. 21, 1928.

c. Irrigation.

The establishment of additional rates for cumulative irrigation water and for water not regularly applied for in advance of the irrigation season was authorized. *Re Diamond Ridge Water Co. (Cal.) Decision No. 19092, Application No. 13716, Dec. 2, 1927.*

*d. Railroad.**1. In general.*

In finding railroad rates unreasonable and discriminatory, the California Commission did not prescribe rates to all points covered by the complaint, stating that the carriers were expected to establish rates to all points.

lish rates comparable with those prescribed, distance considered. *Pacific Cottonseed Products Corp. v. Atchison, T. & S. F. R. Co.* Decision No. 19768, Case No. 2470, May 15, 1928.

It has been held by the California Commission that the mere fact that carriers, at the time of the establishment of certain rates, required additional tonnage and revenue is not of itself sufficient justification for unreasonable and unnecessary additional routes. *Re Southern P. Co.* Decision No. 19955, Application Nos. 14399, 14400, June 29, 1928.

The rate for a two-line haul may properly be higher than the rate for a single-line haul, and a complaint alleging rates to be unreasonable to the extent that they exceeded rates contemporaneously maintained for a single-line haul on the assumption that a railroad, being owned jointly by two other carriers, should be treated as a part of the latter two lines for rate-making purposes, was dismissed, the record indicating the carrier to be a separate corporate entity, operated as an independent line, and handling traffic at interchange points in the same manner as other carriers independently operated. *Union Paving Co. v. Sunset R. Co. (Cal.)* Decision No. 19612, Case No. 2449, April 13, 1928.

The California Commission, in *Western P. R. Co. v. Northwestern P. R. Co.* Decision No. 19457, Case No. 2253, March 10, 1928, held that the establishment of a through route and joint rate from points on one carrier's line to points on another carrier being desirable and in the public interest, that the defendant railroad's failure and refusal to join in such a route was discriminatory and prejudicial to the complainant carrier.

The California Commission held that the complaining carrier was entitled to the longest reasonable haul of traffic originating on its lines, and could not under ordinary circumstances be asked to short-haul itself because of the desire of a third party carrier to interject itself as a participating carrier. *Ibid.*

The Illinois Commerce Commission, in *Illinois Coal Traffic Bureau v. Atchison, T. & S. F. R. Co.* No. 15196, March 29, 1928, made the following statement: "The practice of establishing point to point rates, in disregard of other shipping points in the same origin group, should not be encouraged because carrier competition may and frequently does ultimately compel the establishment of similar and relative rates from the shipping points adversely affected thereby."

The Illinois Commerce Commission has stated: "A principle has been adopted that long established rate adjustments that accord competing producing districts located at different distances from common markets, equal rates, should not be disturbed unless substantial justice requires. We have previously held that the inter-

P.U.R.1928E.

est of the consumer as well as the producers should be considered and unless actual injury is established by dissatisfied producers deprived of their natural advantage of location these rate groups should not be disturbed." *Ibid.*

In *Dallas Chamber of Commerce v. Texas Carriers*, Docket No. 2551, April 11, 1927, March 20, 1928, the Texas Commission, in granting pleas for equalization in fixing rates on sugar and molasses from New Orleans to Texas destinations, said: "It is our view that our answer to this question of equalization should reflect what in our careful judgment would be for the best interest of the state and the country as a whole, having in mind at the same time the necessity of allowing a fair return to the carriers, and the maintenance of a fair relative adjustment as between the different ports. There is not now, and we trust never will be, any purpose of this Commission to prefer one port over another, or, by any rate adjustment, place one port at a disadvantage over another, and our action in this case cannot fairly be said to have such effect. There is, as we see it, nothing to prevent one port from competing with another on equal rates. Surely it is to the advantage of the general public—the producer and the consumer—to have our ports on as nearly an equal basis, all things considered, as possible. Port cities become leading markets for many agricultural and manufactured products, and distributing centers for many of the necessities and comforts of life. If they are developed so that they may be strong competitors both in purchase and distribution, this will undoubtedly be to the public interest."

A carrier which has filed a general distance tariff may never justify a violation of the same by proving a difference in operating conditions. *Arthaud v. Oregon-Washington R. & Nav. Co. (Wash.) Nos. 5956, 6143*, April 10, 1928.

2. Particular commodity tariffs.

Applicable freight rates on packing house products initially iced by the consignor and delivered to carrier with instructions not to re-ice in transit to destinations within the state were held to include provisions for such incidental service otherwise covered by a rule (Rule 240 of the Perishable Protective Tariff No. 1) regarding perishable products in general. *Arizona Packing Co. v. Arizona Eastern R. Co.* Docket No. 2334-R-189, Decision No. 4287, Jan. 30, 1928.

In *San Joaquin Grocery Co. v. Southern P. Co.* Decision No. 19035, Case No. 2347, Nov. 12, 1927, the California Commission held that chemically treated and seized paper used for drying fruits did not constitute fruit trays but fell within the description "wrapping paper" or "fruit drying paper" for the application of railroad rates. It was said to be the character of an article from a trans-P.U.R.1928E.

portation standpoint, and not the use to which parties may contract that it shall be put, that determines the rates or rating applicable.

A shipper of sand and gravel objected to a change of the railroad rates on that commodity, stating that several thousand dollars had been spent in the development of that business as a result of previous establishment of a certain rate. The Nebraska Commission, while admitting that this should not be conclusive or all-controlling, stated that there were some merits to the contention and that the shippers' situation was deserving of consideration. The Commission further stated: "There should be some permanency and stability to a rate structure. Constant changes can result only in confusion to the shipper and uncertainty as to business policies to be pursued by him. Particularly is this true where the rate structure becomes an important item in the conduct of his business." Re Chicago, R. I. & P. R. Co. Application No. 7070, July 18, 1928.

The Nebraska State Railway Commission, in Polenske Bros.-Schellak & Co. v. Chicago, B. & Q. R. Co. Formal Complaint No. 588, Feb. 21, 1928, sustained an objection by a counsel for defendant carriers as to questioning the reasonableness of any rate and the taking of any evidence or the making of any rulings thereon in a proceeding on a complaint instituted by a group of brick manufacturers alleging merely preferential rates between various points in the state on the quantity to be manufactured. The Commission was of the opinion that the complaint did not specifically attack the unfairness or unreasonableness of the rate and that, therefore, the carrier should have an opportunity to answer any evidence presented thereon.

A corporation dealing in scrap iron purchased a number of empty projectiles made of steel and copper from the government with the understanding that they were to be removed within fifteen days. Not having sufficient opportunity to dismantle the projectiles, the company was obliged to have them transported as empty projectiles and subsequently complained that the classification should have been as scrap iron. The New Jersey Board of Public Utility Commissioners decided that the classification of scrap must include material reduced to fragments or pieces so as to be useless for any other purposes than remelting and that rates could not be lawfully established on the basis of the price at which the commodity was sold or the use to which it was to be put, and that the shipment was, therefore, properly classified. Kaufman & Sons Co. v. Wharton & N. R. Co. June 7, 1928.

e. Street railway.

A single coin fare eliminating the use of pennies was held to be a distinct advantage, and to reflect in better and faster service with P.U.R.1928E.

ANNOTATION.

one-man operation of cars. *Re Peninsular R. Co. (Cal.) Application Nos. 13585, 13584, Decision No. 19592, April 13, 1928.*

Rates of fare should be the same on two electric railways in the same community, being under the same management and the same wage schedules, and the tokens of the two companies should be interchangeable and good for transportation on either line. *Ibid.*

The Illinois Commerce Commission makes the following comment on the value of service with respect to children's street railway fares: "With respect to the increase in fares for children from six to twelve years of age from 3 cents to 5 cents the Commission feels that such a large increase is not warranted in this particular class of service. It is manifest that this increase will produce some decrease in riding and so great an increase (66½ per cent) as is here petitioned for children's fares may decrease riding to a point where little or no increased revenue will result. The Commission will, therefore, modify the proposed increase in children's fare believing that the value of that particular class of service is not commensurate with the proposed rate." *Re Illinois Power Co. No. 18045, July 31, 1928.*

An increase of fares for children from 4 to 5 cents where the regular fare was 10 cents with three tickets or tokens for 25 cents was denied in view of the probable decrease of riding by children, especially by school children who usually ride relatively short distances, to the point where little or no increase in revenue would result, and in view of the fact that the value of that particular class of service was not commensurate with the proposed rate. *Re Illinois Power & Light Corp. (Ill.) No. 17242, Feb. 16, 1928.*

A street railway company operating trolley cars and motor busses was authorized to establish a 10-cent cash fare for persons over twelve years of age with three tickets or tokens for 25 cents and a fare of 4 cents for children between the ages of five and twelve years. *Ibid.*

A charge for transfers on street cars and motor busses operated by a street railway company should be adopted only after very conclusive evidence has been produced in support of this particular measure. *Ibid.*

School children should have preserved to them in the unified service of busses with street cars the rates of fare which they have been previously accorded by a feeder bus and street railway combined. *Re Peoples Motor Coach Co. (Ind.) Nos. 34-M, 499-M, 540-M, Feb. 25, 1928.*

Patrons of busses and street railways seeking to co-ordinate and unify service are entitled to one transfer from one bus to another or from street car to bus in all parts of the city. *Ibid.*

Passengers transferring from a street car to bus were ordered to pay an equalizing fare on entering the bus in the promulgation of P.U.R.1928E.

plans for the unification of service between bus and street car transportation systems. *Re Peoples Motor Coach Co. (Ind.) Nos. 34-M, 550-M, 542-M, March 2, 1928.*

Commutation fares for school children in a co-ordination of service between bus and street railway companies were made to bear the same charge for transfer as applicable to patrons of the street car system. *Ibid.*

In approving a plan for the unification of service between a bus company and a street railway company, in *Re Peoples Motor Coach Co. Nos. 628-M, 621-M, March 2, 1928*, the Indiana Commission said that the unification of service must be accompanied by a unification of such charges as are necessarily incident to the co-ordination of service and that, therefore, the rate of fare sought to be preserved for pupils attending the public and parochial schools, on the basis of charges at which they were presently served should be made available as the result of unification of service in the instant case.

The New Hampshire Commission has held that a street railway should be permitted to test out different rate schedules which are lawful and reasonable until it finds the one best suited to the needs of the community served and of the company. *Re Nashua Street R. Co. D-1090, Feb. 8, 1927.*

According to a general 5-cent fare zone plan approved by the Board of Public Utility Commissioners of New Jersey, it had been found necessary and advisable in a number of cases to adjust street railway zone limits to meet more fairly and accurately the traffic conditions existing along the routes. While this plan contemplated one zone within the city limits of the larger municipalities on any route passing through it, yet this was not absolute, particularly in the smaller communities, it being necessary to consider other factors in such cases, such as trend of traffic, traffic centers, etc., resulting in some cases in two fares being within the municipal limits. It was accordingly held that the zone points on the route in question were located in accordance with the advantage of the greatest number of patrons of the line, in *Re Middlesex*, April 17, 1928.

A street railway company, in *Re United Electric R. Co. (R. I.) Order No. 1251½, March 23, 1928*, was authorized to change a zone limit from a city line to the farther side of a bridge on all in-bound trips of cars using the bridge because of the fact that people riding on such cars desiring to go to their place of business would otherwise be compelled to walk across the bridge, which at times, due to inclement weather, was very disagreeable.

f. Telephone.

A request for a guarantee of fifty messages a month per station on a toll line was granted with the provision that traffic records of P.U.R.1928E.

all originating and terminating messages should be kept so that data available for a determination of the reasonableness of the rates could be obtained. *Re Home Teleph. Co. (Cal.) Decision No. 19107, Application No. 13951, Dec. 8, 1927.*

A proposed schedule of toll rates was approved in so far as the changes were made to conform with a new nationally adopted schedule, but stations to which the utility had previously rendered free interexchange were ordered to be placed upon a list of "special rates," designating exchanges to which free service was to be extended, upon a showing that the utility was attempting to collect toll rates over mutually owned lines, the owners of which were not interested in a discontinuance of free service. *Re C. T. & N. Teleph. Co. (Ill.) No. 17047, Nov. 23, 1927.*

The Missouri Commission, in *St. Louis County Improv. Asso. v. Southwestern Bell Teleph. Co. Case No. 5476, March 19, 1928*, denied a petition of 36 complainants residing in a remote suburb in the city of St. Louis asking for city exchange service and claiming a discrimination in existing service connections. Evidence showed that some subscribers residing in the same community had St. Louis service while others were connected to the local exchange. The Commission pointed out however, the expense of cable installation and other equipment if all subscribers in the complaining communities were to be so connected, and further stated: "Undoubtedly, there should be some dividing line beyond which the company should not be called upon or compelled to furnish the city service and the company has in this case been authorized to establish the Henley Road as the dividing line beyond which the zone service is to be furnished."

The Nebraska Commission, in *Re Continental Teleph. Co. Application No. 7010, Nov. 12, 1927*, approved an application to establish a nonsubscriber charge of 5 cents per call from one telephone to another on the same exchange, and of $2\frac{1}{2}$ cents where the nonsubscriber calls over fifty parties in succession. The latter rate was intended to apply to agents who sometimes called all the subscribers on an exchange.

The Nebraska Commission, in *Re Farmers Mut. Teleph. Co. Application No. 6907, Feb. 24, 1928*, approved an application the purpose of which was to equalize the toll charges between various points within the state by establishing rates on the basis of air line distance between the originating and the terminating points of the toll messages. It appeared that under the tariff previously in existence the charges of different telephone companies were somewhat irregular for toll service between different points of approximately the same distance. The Commission stated that the air line method of assessing charges was reasonable and tended toward a uniform method which
P.U.R.1928E.

was advisable and in the instant case such a practice would establish a uniform toll rate in the territory involved.

The rate for hand-set equipment was reduced from 50 cents to 25 cents upon application by a telephone company to the Nebraska Commission. *Re Northwestern Bell Teleph. Co. (Neb.) Application No. 7160, Feb. 25, 1928.*

The establishment of toll rates between points in an area developed as a whole upon the basis of free interexchange, for the improvement of service rather than of revenue, was refused where it was shown that none of the subscribers complained of the alleged resulting unsatisfactory service but did insist upon a continuation of the existing condition. *Re Nuckolls County Independent Teleph. Co. (Neb.) Application No. 6314, Nov. 30, 1927.*

Adequate service requires that telephone subscribers should be provided with connection to their natural market town without toll charge. *Unbehaun v. Commonwealth Teleph. Co. (Wis.) U-3684, March 9, 1928.*

An extra charge of 25 cents a month in addition to the regular rate was held to be reasonable for the use of hand-set telephone equipment. *Re Wisconsin Teleph. Co. (Wis.) U-3660, Feb. 23, 1928.*

g. Water.

Water furnished to rest rooms for the personal convenience of industrial employees was held to be a domestic use. *Pejepscot Paper Co. v. Lisbon, — Me. —, 142 Atl. 194, May 14, 1928.*

Office rate, fixed at the same amount as a domestic rate by a water utility's schedule, was held to be restricted to such water as was used exclusively in the conduct of an office, such as drinking water, lavatories, and water closets. *Ibid.*

The fact that a building to which water is supplied is used for industrial purposes is not the criterion by which to determine whether such water should come under the commercial or industrial rate, but such test should be the nature of the intended use. *Ibid.*

The term "domestic" with relation to water rates was held to have a broader significance than ordinary home and household life which must be determined with the reference to health, comfort, and sanitary convenience of mankind in buildings other than dwellings. *Ibid.*

A so-called "combination stationary washtub" cannot be classified as a "bathtub" within the meaning of rate schedule placing special charges on service to extra baths in excess of one to each premise. *Subin v. New York (N. Y. Mun. Ct.) 229 N. Y. Supp. 628, June 22, 1928.*

The Pennsylvania Commission, in commenting on the necessity for real fire protection and assessing charges for hydrants for a wa-P.U.R.1928E.

ter company, stated: "There are nine public fire hydrants installed in the borough for which the new tariff provides an annual charge of \$50 per hydrant, but the record indicates that respondent's system affords little, if any, fire protection, and accordingly the Commission is of the opinion that this rate is unreasonable and will order its discontinuance." Conyngham v. Conyngham Water Co. Complaint Docket No. 7361, May 21, 1928.

A water utility complained that a canning company operating only a short period of the year during its canning activities used water in such quantities that the utility's standpipe was inadequate to supply properly the water needed, and as a consequence it was necessary for the utility to operate its pump continuously during the hours of canning operations. The Wisconsin Commission permitted a special rate to be charged that would be compensatory for this unusual service. Re Stratford, U-3731, July 2, 1928.

WISCONSIN RAILROAD COMMISSION.

TOWN OF MINOCQUA

v.

VILLAGE OF EAGLE RIVER.

[U-3740.]

Municipal plants — Restrictions to operation in another municipality — Indeterminate permit.

1. A municipality acting in its proprietary capacity as the operator of a public utility in another municipality accepts thereby an indeterminate permit subject to all the limitations, restrictions, and regulations imposed by law upon the holder of such a permit in the same degree as a private corporation under like circumstances, p. 209.

Municipal plants — Condemnation of property by another municipality — Indeterminate permit.

2. A municipality acting in its proprietary capacity as the operator of a public utility in another municipality is subject to the statutory rights of the latter to condemn its property for public use, p. 209.

[August 25, 1928.]

PROCEEDINGS by a town to acquire an electric plant owned and operated within its boundaries by a village; objection to jurisdiction overruled.

By the **Commission:** On June 22, 1928, the town of Minocqua, Oneida county, Wisconsin, filed with the Commission a P.U.R.1928E.

petition giving notice that the town of Minocqua had determined to acquire the existing plant owned and operated by the Eagle River Water & Light Commission and the village of Eagle River used in the furnishing of heat, light, and power in and to the town of Minocqua, and to the inhabitants thereof and the public generally, and requesting that the Commission proceed as required by § 197.03 of the statutes to determine the just compensation to be paid to the village of Eagle River for the property so taken.

A hearing was duly noticed and held at Minocqua on July 25, 1928. By stipulation an adjournment was taken to Madison on August 1, 1928, at which time and place there appeared W. K. Parkinson, attorney, and Lincoln Abraham, chairman, for the town of Minocqua, and Eberlein and Larson, attorneys, by A. S. Larson, and Frank W. Carter, village attorney, for the village of Eagle River, appearing specially for the purpose of objecting to the jurisdiction of the Commission.

The grounds for the jurisdictional objection are stated as follows:

[1, 2] "Because the statutes of Wisconsin do not authorize one municipality to condemn the property of another municipal public utility nor to acquire the same under Chaps. 196 and 197 of the Statutes of the state of Wisconsin without the consent of such municipal public utility.

"Because the major part of the public utility property of the village of Eagle River is not situated within the town of Minocqua and there is no authority in the said town of Minocqua to acquire or purchase the same under the provisions of Chaps. 196 or 197 of the Statutes of Wisconsin without the consent of the village of Eagle River.

"Because it appears that the election held in the town of Minocqua was not a valid election and that a valid election is a condition precedent to the jurisdiction of the Railroad Commission of Wisconsin to proceed to determine the compensation to be paid under the provisions of § 197.05 of the Statutes of Wisconsin."

Oral argument was had before the three members of the Com.
P.U.R.1928E.

mission and briefs were filed with respect to the jurisdictional questions raised.

With respect to the first objection, the Commission is satisfied that a municipality which, acting in its proprietary capacity, engages in the operation of a public utility plant in another municipality accepts thereby an indeterminate permit and is subject to all of the limitations, restrictions, and regulations imposed by law upon the holder of an indeterminate permit in the same degree as is a nonmunicipal corporation engaged in like business. The supreme court has held that a city may hold an indeterminate permit. *Central Wisconsin Power Co. v. Wisconsin Traction, Light, Heat & P. Co.* 190 Wis. 557, P.U.R. 1927A, 76, 209 N. W. 755.

With respect to the second jurisdictional objection, the questions raised have been fully answered by the supreme court in *State ex rel. Wisconsin Traction, Light, Heat & P. Co. v. Circuit Court*, 162 Wis. 234, 155 N. W. 139.

With respect to the third jurisdictional objection, the Commission does not have before it any facts to justify a finding that the election held in the town of Minocqua upon the question of acquisition was not a valid election. Until such proof is made before the Commission, there is no basis for action with respect thereto.

Note.—The United States Circuit Court of Appeals, in *Cudahy Packing Co. v. Omaha*, No. 7478, 24 F. (2d) 3, Jan. 10, 1928, held that a city acquiring a water plant from a private company under a deed making the transfer subject to obligations entered into by its predecessor with its consumers was released from an obligation originally incurred by the water company in fixing special rates to a particular consumer where the customer made a supplemental contract upon the municipal acquisition under which the company was relieved in event that the city should ever raise the rates above the contract price.

In *Rapid Transit Subway Construction Co. v. New York*, 129 Misc. 714, 223 N. Y. Supp. 24, April, 1927, the plaintiff subway construction company was limited by law (Greater New York Charter, §§ 149, 261) in its recovery from the city for utility construction to the amount of its original claim required to be presented to the city comptroller.
P.U.R. 1928E.

IDAHO PUBLIC UTILITIES COMMISSION.

RE ARLEY DARNIELLE.

[Case F-663, Order No. 1138.]

Service — Discontinuance — Telephone — Mutual company.

1. The refusal of a public utility company to furnish service in any part of a territory in which an independent company, not a public utility, has entered cannot be justified, providing public convenience and necessity requires service therein, p. 212.

Monopoly and competition — Long distance telephone service — Mutual company.

2. The Commission will permit a telephone utility able and willing to furnish long distance service to enter and furnish the same to a territory, where an existing utility refuses because an independent non-utility is furnishing a limited service, p. 213.

Monopoly and competition — Refusal to serve — Mutual company.

3. A long distance telephone company was permitted to enter and serve a patron having a store in which the instrument of a nonutility mutual company was installed, where the local utility refused service in premises having the mutual service, p. 213.

[August 17, 1928.]

APPLICATION of store-keeper for telephone service; granted.

Appearances: Fred B. Jones, Manager, Boise, for Mountain States Telephone & Telegraph Company; Dean Driscoll, Attorney, Boise, for the applicant; C. C. Darrah, Manager, Sweet, for the protestant, Brownlee Telephone Company.

By the Commission: This case was instituted by the applicant, Arley Darnielle, of Gardena, Idaho, who filed a petition with the Commission on May 17, 1928, praying for the installation of a telephone in his store at Gardena, Idaho by the Mountain States Telephone & Telegraph Company.

A protest was filed against such installation on behalf of the Brownlee Telephone Company, operating in the territory adjacent to Gardena, Idaho, by its General Manager, C. C. Darrah.

Hearing on the matter was held in accordance with an order of the Commission at the office of the Commission in the state capitol, Boise, Idaho, at 3 o'clock P. M., on July 13, 1928. Appearances were as above noted. Oral and documentary evidence was submitted, the case closed and the matter taken under advisement.

P.U.R.1928E.

The evidence shows that the store of Mr. Arley Darnielle is situated at Gardena, Idaho, on the Payette river some six miles north of Horseshoe Bend, Idaho, about twelve miles northeasterly from Sweet, and about fifteen miles northeasterly from Montour, Idaho. The lines of the Mountain States Telephone & Telegraph Company extending from Emmett pass through Montour and Horseshoe Bend, and within a few rods of the store of the applicant at Gardena, Idaho; thence on to McCall, Idaho, and other points.

The Brownlee Telephone Company is a public service corporation, and operates a telephone line from Sweet by way of Brownlee to Gardena, which said line has been in operation for six years last past. That during the year 1922 the said company installed a long distance telephone in Arley Darnielle's store at Gardena, Idaho. That an independent telephone line known as the farmer's line has been in operation in a portion of the territory in which the Brownlee Telephone Company has been operating for approximately the same period of time. The said independent telephone line is not a public utility, and this Commission has no jurisdiction thereof.

That during the month of April, 1928, Arley Darnielle had installed in his store at Gardena a telephone of the independent farmer's line, and upon the installation of said telephone the said Brownlee Telephone Company removed from his store the long distance telephone which it had installed therein, and refused, and still refuses, to reinstall said telephone so long as the telephone of the said independent farmer's line remains therein.

The state highway extends from Horseshoe Bend to McCall and passes the store of Arley Darnielle at Gardena, Idaho. The evidence shows that the applicant, Arley Darnielle's store is the only store at Gardena, Idaho, and that frequently during the day there are requests for long distance telephone service at his store by the traveling public and the residents around Gardena.

[1] The refusal of a public utility company to furnish service in any part of a territory in which an independent company, not a public utility, has entered cannot be justified providing public convenience and necessity requires service therein.

P.U.R.1928E.

[2, 3] In this matter all this Commission is to determine is whether or not public convenience and necessity requires long distance telephone service at Gardena, Idaho. In case a public utility operating in a territory refuses to furnish needed service when said service has been, and can be, furnished at reasonable cost, this Commission can but permit another utility, able and willing to furnish such service, to enter and furnish the same. A public utility is not justified in withdrawing from a field, or any part thereof, when an independent company, not a public utility, enters such field. The public is entitled to continuity of service, and this Commission not having jurisdiction to require an independent company, not a public utility, to give continuity of service, and where a public utility company refuses to continue service, such company has no cause for complaint in case another public utility enters and furnishes the service which it has refused, and still refuses, to furnish.

Upon a consideration of all the facts, conditions, and circumstances in evidence the Commission finds that public convenience and necessity requires the installation of a long distance telephone at the store of the applicant, and that the Mountain States Telephone & Telegraph Company should be permitted and required to make such installation.

WASHINGTON DEPARTMENT OF PUBLIC WORKS.

DEPARTMENT OF PUBLIC WORKS EX REL. TOWN
OF ASOTIN

v.

PACIFIC POWER & LIGHT COMPANY.

[No. 6080.]

Rates — Reasonableness — Ability to pay.

1. The method of basing rates on the ability of the consumers to pay or upon the consumers' desire for low rates appears to be erroneous and cannot be considered by the Department, p. 215.

Apportionment — Different classes of water service — Facilities used.

2. Allocation was made of the cost of distributing water to various classes of service by including all of the facilities used directly or indirectly in supplying water to any particular class of service, p. 216.

P.U.R.1928E.

Apportionment — Classes of water service — Consumption and demand basis.

3. Allocation of plant as between various classes of water service was made on a consumption basis rather than the usual demand basis, p. 216.

Rates — Water — Preferred customer.

4. Rates to a power plant to which water was not available during several months by reason of the exhaustion of supply by other preferred classes of service were ordered to be 50 per cent less wholesale than rates for such other classes of service, p. 217.

Depreciation — Percentage allowed — Water companies.

5. An allowance of 3.68 per cent of the fixed operating property of a water supply company, exclusive of land, was authorized for depreciation, p. 210.

[August 2, 1928.]

COMPLAINT of a town against alleged excessive water rates of a power company; rates adjusted in accordance with findings herein.

By the Department: This matter came on regularly for hearing at Asotin, Washington, on the 19th day of April, 1928, pursuant to notice duly given before John C. Denney, Director, and C. Rea Moore, Supervisor of Public Utilities, the Department being represented by R. E. Ostrander, Legal Assistant.

The parties were represented, as follows: H. L. Post, Attorney, Clarkston, Judge M. F. Gose, Olympia, for town of Asotin; E. J. Doyle, City Attorney, Clarkston, city of Clarkston; H. S. Gray, Attorney, for Pacific Power & Light Company.

Witnesses were sworn and examined, documentary evidence was introduced, and the Department being fully advised in the premises makes and enters the findings of fact and order as hereinafter set forth.

The determination of reasonable rates for the town of Asotin presents a rather complicated problem due to the fact that the transmission main supplies water for four general classes of service, namely, hydroelectric power generation for the Asotin power plant, wholesale to the town of Asotin, retail to irrigation customers, and retail for domestic, commercial, and fire protection purposes in the town of Clarkston and vicinity.

The Department's engineers and accountants have made a rather elaborate study of this problem and have suggested a method of P.U.R.1928E.

allocating a certain part of the plant value and the operating expenses and taxes, based on the maximum demand. In arriving at the plant value from which a portion was to be allocated to Asotin, the Department's engineers have considered all the facilities directly or indirectly supplying water to Asotin.

The respondent's engineers have presented a somewhat different method of allocation using the maximum demand as a basis for three of the general classes of service, but have treated the hydroelectric power plant differently. The excess investment above the power plant has been charged to that operation and charges were made for the water used at the rate of \$0.001 per kilowatt hour of energy generated, this charge being applied as a credit to the cost of operating the headworks and the transmission pipe lines. In allocating a portion of the plant to Asotin only those facilities have been considered that are above the Asotin tap and that are used directly by Asotin in securing water. The respondent's engineers, however, have found the percentage applicable to Asotin on the maximum demand basis to be greater than that found by the Department's engineers.

While the methods used by the Department's engineers and by the respondent's engineers are different, the final results are practically the same, namely, that the annual rate of return applicable to Asotin appears to be about $2\frac{1}{2}$ per cent for the year 1927, this year being considered a normal year in so far as cost of operation is concerned.

The complainant did not present any exhibits showing its suggested methods of computing the operating income and rate of return applicable to Asotin. It did, however, present considerable testimony to show that it was operating its municipal water system at a loss and that it would derive a considerable benefit if the rates it paid to the respondent were lowered.

[1] It appears to the Department that the testimony of the complainant indicated that the rates should be fixed on what the complainant desired to pay rather than based upon the cost of service. Similarly, it appears to the Department that the respondent believes that the rates charged for water service to the respondent's hydroelectric plant should be based on what the respondent believes that the hydroelectric plant should pay for P.U.R.1928E.

such service rather than based on the cost of service. The method of basing rates on the ability of the customers to pay or upon the customers' desire for low rates appears to be erroneous and cannot be considered by the Department.

[2, 3] On pages 34 to 39, inclusive, of the report of the chief engineer of the Department (Exhibit No. 1), there appears a discussion and tables relative to the allocation of plant to Asotin. Various methods are discussed and the Department's engineers chose Method No. 4, which is set out at the bottom of page 35 and the top of page 36 of the report. This method includes all the facilities used directly or indirectly in supplying water to any class of service, and appears to be reasonable and to conform to the method followed by the Department in fixing rates for various utilities throughout the state, in so far as inclusion of facilities are concerned. The report states, "The allocation might be made on the basis of consumption, on the basis of maximum demand, or probably some other basis might be used." A somewhat similar statement occurs in the discussion of Method No. 3 on page 35.

The table on page 38 entitled, "Water Duty" sets forth the average consumption in cubic feet per second for the four general classes of service and also sets forth the maximum annual demand on an average monthly basis in cubic feet per second for the same classes of service. These computations have been made on two bases, first, assuming the Asotin power plant to operate as it has in the past and, second, assuming that the Asotin power plant has been abandoned. From the testimony it appears that the estimates of consumption and demand as included in this table are reasonably correct and closer estimates probably could not be obtained since only a very small amount of the water used is metered.

The methods used by the Department's engineers and by the respondent's engineers while differing considerably in detail, both use the maximum demand as the basis for allocating a part of the plant and a part of the operating expenses and taxes to Asotin. This is the method commonly used in establishing electric rates, but is not ordinarily used in establishing rates for water service. The method ordinarily used in establishing water rates
P.U.R.1928E.

is on a consumption basis, the matter of maximum demand being given consideration in establishing a minimum charge per month for such service. Since the consumption basis is the method ordinarily used throughout the state by the water utilities and by the Department in establishing water rates, and since it appears to be the logical method to use in this case, the consumption method will be followed.

[4] The testimony indicated that the town of Asotin was given preference in the use of water at times of shortage and that the Asotin power plant has been operated only when water is available, and has been shut down when water is not available. While some curtailment of service has been made to the irrigators and to the city of Clarkston, it would seem reasonable to place these classes of service on a basis with the town of Asotin in determining wholesale rates for water delivered from the transmission main extending from the headworks on Asotin Creek to the Pomeroy Gulch reservoir, the impounding, purification and transmission facilities being considered as a unit. It appears that the electric system of the respondent has two peaks, one during the irrigation season in the summer and the other during December or January. Since water is not available to operate the Asotin power plant on the summer peak, it would seem to be unfair to charge the power plant on the same basis for water as the other classes of service. The matter of determination of the rates charged the Asotin power plant as compared with the rates charged the other three classes of service is not a matter susceptible to careful engineering and accounting computations, but is a matter of opinion. The Department believes that the wholesale water rates charged to the Asotin power plant should be less than fifty per cent of the wholesale water rates charged to the other three classes of service.

Findings of Fact

I

That the Pacific Power & Light Company operates a water and irrigation system for the public use in the vicinity of Asotin and Clarkston, Washington, and is a public service company subject to P.U.R.1928E.

the jurisdiction of the Department of Public Works. That this system is owned by the Inland Power & Light Company, a subsidiary of the Pacific Power & Light Company.

II

That on January 5, 1927, the town of Asotin entered a complaint with the Department with reference to the rates charged the town for water service. Negotiations were entered into, and these having failed, the matter was set for investigation and hearing.

III

The transmission facilities supply water for four general classes of service, namely, hydroelectric power generation for the Asotin power plant, wholesale to the town of Asotin, retail to irrigation customers and retail to customers residing in the city of Clarkston and vicinity.

IV.

That the Department has, in this same proceeding, made and entered its order fixing as of December 31, 1927, the sum of \$364,313, as the fair value for rate-making purposes of the respondent's property hereinafter described, which is used and useful in rendering water service to the four general classes of service in the vicinity of Asotin and Clarkston; fixing as of the same date the sum of \$4,500, as a reasonable allowance for working capital and supplies for the operations hereinbefore outlined; and making as of that date the sum of \$368,813, the rate base upon which the respondent is entitled to earn a rate of return in the supplying of water from the transmission system without considering the distribution systems. The fair value enumerated above includes all lands; buildings, fixtures and grounds; and structural facilities in connection with the headworks, and the transmission main from the headworks, to, but not including, the Pomeroy Gulch reservoir, and including the purification facilities located near the Asotin power plant. There are also included values for the pumping station, the pumping equipment, the purification facilities and the small transmission mains located at or near the Clarkston substation. The fair value also includes the telephone lines and equipment from the Asotin power plant
P.U.R.1928E.

to the headworks, the utility's equipment which is allocated to the collection and transmission of water, miscellaneous equipment consisting of tools used on the headworks and the transmission main, and all furniture and office appliances allocated to water operations. In addition there are included general expenditures and intangible fixed capital in connection with the above facilities. The fair value enumerated above does not include any of the respondent's distribution systems using this term in its general sense to include local storage facilities, secondary transmission mains, distribution mains, services, hydrants, meters, et cetera.

V

[5] That a reasonable allowance for depreciation as of December 31, 1927, is 3.68 per cent of the fixed operating property as hereinbefore outlined, exclusive of land.

VI

That the probable annual earning capacity under the present rates (gross operating revenues) is \$37,505, for the entire water system of which about \$1,700 is derived from Asotin. The amount required to meet annual operating expenses is \$21,600 for the entire water system, and the amount required to meet fixed charges, not including interest, for the entire water system is unknown.

VII

The total annual cost, including operating expenses and fixed charges, for delivering water from the respondents transmission mains is \$54,900 which is made up, as follows:

1. Source of water supply expense }	\$6,700.00
2. Transmission pipe line expense }	500.00
3. Power pumping expense	1,600.00
4. Purification expense	1,600.00
5. General and miscellaneous expenses—allocated	<hr/>
6. Total operating expenses	\$10,400.00
7. Depreciation	\$13,250.00
8. Taxes—allocated	1,750.00
9. Return on rate base	<hr/> 29,500.00

Total annual operating expenses and fixed charges for water delivered wholesale from transmission mains ... \$54,900.00
P.U.R.1928E.

VIII

The table set out below indicates the average rate of water used by the four general classes of service and indicates the amount used per year. The first column sets out the average rates of use per year expressed in cubic feet per second which rates of flow are as found on page 38 of the report of the Department's engineers. (Exhibit No. 1). The second column has been obtained from the first column and expresses approximately the number of thousands of gallons used per year by each general class of service.

	Annual Average c. f. s.	Thousand Gallons Per Year.
1. Irrigation	8.74	2,067,010
2. Domestic (Clarkston and vicinity)	1.54	364,210
3. Asotin, town of	0.41	96,965
4. Asotin power plant	21.46	5,075,290
5. Total	32.15	7,603,475

IX

That the rates for water service from the respondent's transmission mains, which might be termed "wholesale water rates," should be \$0.012 per thousand gallons for the various classes of service, except the Asotin power plant which should be \$0.005 per thousand gallons. Without giving consideration to a minimum charge these rates will produce annual revenues of \$55,714 when applied to the amount of water used as indicated in finding of fact VIII. This revenue is in excess of the annual cost of service as found in finding of fact VII.

X

That when consideration is given to the maximum demand the rates charged to the town of Asotin by the respondent for water service from the respondent's transmission main should be, as follows:

1. For all water delivered each month, per 10000 gallons \$ 0.012
2. The minimum charge each month shall be 62.50
3. The maximum delivery to be required of the company shall not be more than 800,000 gallons in one day.
4. Payment shall be made on or before the 10th day of each month for water furnished during the preceding month upon the basis of the foregoing schedule.

Based on the 1927 consumption, these rates will yield an annual revenue of \$55,714.

nual revenue of approximately one thousand three hundred and twenty dollars.

That the rates enumerated above are submitted as wholesale rates from the transmission main of the respondent and do not include any allowance for operating expenses and fixed charges in connection with the distribution of water, and furthermore, since the city of Clarkston and the irrigators have not been made a party to the rate proceedings, the rates enumerated above are not applicable at this time to these two general classes of service.

SOUTH CAROLINA RAILROAD COMMISSION.

RE ROCK HILL TELEPHONE COMPANY.

[Order No. 425.]

Rates — Commission power over franchise — Effective date of statute.

1. Rates fixed by franchise contract providing that they shall not be changed without consent of the municipality are nevertheless subject to the police power of the state to regulate unreasonableness in rates, where the contract was executed subsequent to a statute delegating the exercise of such state powers to the Commission, p. 224.

Rates — State policies — Franchise contract.

2. It is the policy of the state, notwithstanding its powers, to disregard the rate-making provision contained in a franchise, never to do so unless it clearly appears that rates thereby authorized are unreasonable and confiscatory, p. 224.

Apportionment — Telephones — Long distance and exchange service.

3. Long distance or toll line business was not permitted to be separated from local exchange business in computing gross revenues for a rate-making proceeding, where the exchange service over long distance lines was of far greater value than that rendered by toll lines, and where the company gained by treating both operations as a unit, p. 224.

Evidence — Six-month order — Telephones — Alternative audit.

4. An audit covering telephone operations for a period of six months was excluded, where the unit of time covered by a proposed rate was a year, where it covered the slack business portion of the year and where another audit of the entire year was available but with which it could not be combined without conflict, p. 228.

Depreciation — Cost as basis for computation.

5. The cost of utility property is the only possible reasonable authority upon which depreciation can be calculated, p. 230.

P.U.R.1928E.

Depreciation — Purpose of reserve.

6. Depreciation reserve is intended to keep the utility investment level, but not to insure the hazards of the varying future, p. 230.

Valuation — Interest on borrowed money.

7. Interest upon borrowed money cannot be capitalized in the rate base, p. 230.

Procedure — Rehearing of rate-making proceeding.

8. Rate-making proceedings will not be open for the purpose of allowing the losing side to introduce an entirely new and different rate base, p. 231.

Procedure — Rehearing — Scope of proposed evidence.

9. Rate-making proceedings will not be reopened where the new evidence proposed to be introduced could not change the result of the vote already taken by the Commission, but where, on the other hand, the same result would probably be reached, p. 232.

Evidence — Ignorance of legal effect — Audit.

10. The fact that at the time an audit was made the utility did not realize the influence of original cost upon its rate application, is no justification for not stating the audit accurately if it could be done, p. 232.

Evidence — Ignorance of effect — Presumption of credibility.

11. The fact that significance of original cost was not understood when an audit was made, was believed to tend toward freeing such statement from doubt and add rather than subtract from its value as evidence, p. 232.

Valuation — Original cost — Price index curve evidence.

12. Price index curve was held to be evidence of no value whatever in ascertaining original cost in view of the reflection in such curve of any abnormal activity of any commodity in any market at any time during the period covered, which could not possibly enter or influence the cost of the particular utility plant, p. 233.

Depreciation — Excessive allowance — Telephones.

13. Depreciation allowance that would enable a telephone company to reproduce its entire plant within eight years was held to be unreasonable in view of the amount of money spent each year for upkeep, p. 234.

Depreciation — Percentage allowed — Telephones.

14. An allowance of 5 per cent was held to be ample to protect depreciation of a telephone plant, p. 234.

Return — Percentage allowed — Telephones.

15. Rates yielding a return of approximately eight per cent on the present value of telephone properties were held to be sufficient and a petition for an increase was refused, p. 234.

Rates — Franchises — What constitutes stations — Telephones.

Statement that private branch stations should be counted as "stations" within the meaning of franchise purporting to fix telephone rates at or below a certain number of stations, p. 224.

Depreciation — Basis for computation.

Statement that depreciation is a reserve to equalize retirements and not a reserve to equalize replacements, p. 230.

[June 20, 1928.]

PETITION by telephone company for increased rates, also petition to reopen the proceeding; petition to reopen was denied and petition for increased rates dismissed.

By the Commission: This is an application for an increase of rates made by the Rock Hill Telephone Company. The application is resisted by the city of Rock Hill and certain subscribers. The subject was handled by the Commission informally during the months of May, June, and July, 1927, and during this period of time a number of conferences were held by the Commission with the applicant and city council of Rock Hill for the purpose of aiding the parties in reaching an agreement. These efforts were fruitless, however, and on July 28, 1927, the telephone company filed its petition for a proposed increase, alleging that its investment in its plant for exchange service was the sum of \$131,774.36, upon which its net revenue for the year 1926 was only \$248.58, and that its present rates do not yield a fair return upon the value of its property, used and useful. The city of Rock Hill and certain other subscribers (who shall hereafter be designated as the respondents) appeared and objected to any increase, first, because they alleged the petitioner was operating its exchange under a franchise granted by the city, which fixes the rates at the present scale; second, that the present rates yield a fair return; and, third, that its service is inadequate.

Considering first the question of service, we think the service rendered by the petitioner is adequate. We have no doubt, as testified to by certain witnesses, that now and then individual subscribers have cause to complain. But it must be remembered that in the operation of any large business there are times when some parts of it go wrong, but we are sure that petitioner will be glad to quickly correct instances of unsatisfactory service when called to its attention. Taken as a whole we think the service of petitioner is reasonable.

P.U.R.1928E.

[1] Next, upon the point that the rates are fixed by franchise. It appears that provision for fixing petitioner's rates is made in the franchise granted by the city of Rock Hill in 1911. Section 4837 of the Code of 1922, Volume 3, provides: That in cities and towns where franchises have been granted to operate and maintain a telephone exchange, and the rates and tolls are fixed in the franchise so granted, an increase in the rates shall not be made except by agreement with the municipal authorities, and it is contended that under its franchise the petitioner is not entitled to any increase, since city council of Rock Hill has not agreed thereto. We think that the statute and franchise do not have the influence in this case contended for, that is, of automatically determining the question. But, on the other hand, it can not be said that the franchise should not be considered at all. The statute was enacted in 1904 and was evidently designed to protect only those franchise provisions then in effect and did not purport to impair the power of the state and regulate rates not then covered by such franchise agreements. In fact, the statute very clearly delegates this power to the Railroad Commission. *Miller v. Southern Bell Teleph. & Teleg. Co.* 279 Fed. 806.

[2, 3] But while the state has the power to disregard the rate making provision contained in a franchise granted since 1904, still it would not be its policy to do so unless it clearly appears that the rates thereby authorized are unreasonable and confiscatory, which means that the scale would deprive the telephone company of a fair return, on the one hand, or take more than a fair return from the public on the other, and the burden is on the party seeking to modify such franchise agreement to furnish the character of proof required. Because a franchise is a contract, and where the parties have voluntarily fixed their rights by solemn agreement, such an agreement ought not to be lightly set aside, and doubts should be resolved in favor of the agreement as a matter of public policy. This view makes it more or less unnecessary to determine whether or not, as contended by the city of Rock Hill, the number of stations now connected with petitioner's exchange is more or less than 1250, the number at and below which the franchise fixes the rates, or P.U.R.1928E.

whether or not the stations outside of the corporate limits of the city of Rock Hill could be counted in determining whether the franchise agreement is still in effect. The franchise is not clear as to whether or not the petitioner would be authorized to count its stations outside of the city limits. The respondents contend that the private branch extensions should not be counted as stations, on the ground that they are mere branches or trunks and are not controlled by the same rates. We are inclined to think that private branch stations should be counted as stations. While they are not controlled by the same rates, neither are business stations and residence stations controlled by the same rates, and the fact that they are maintained at little expense is taken into consideration in fixing the rates; but since the petitioner is to maintain the station and the instrument and the connection, we think that in determining the number of stations connected with petitioner's exchange the private branch extensions should be counted. But whether petitioner maintains more than 1250 stations or fewer than that number, the matter comes down, after all, to whether or not, under the showing made, petitioner is receiving a fair return on the value of its property. The parties agree that the value of the exchange property, with depreciation deducted, is the sum of \$127,127.77, and petitioner asks that a scale of rates be fixed which allows a fair return upon that sum without regard to its toll line revenue. In other words, it undertook to separate its long-distance or toll line business from its exchange business and does not include in the scope of its case the value on its toll lines, the expense of its toll line operations nor the income derived therefrom, upon the theory that the toll line business is a separate and distinct entity and has nothing to do with its exchange operations and should not be considered in determining a reasonable rate for its exchange. That question, of course, is to be determined by the facts. The toll line revenue comes from two sources, that is, from petitioner's own toll lines and from "commissions" paid it by the Southern Bell Telephone Company for long-distance business originating at its exchange. The toll lines and the toll line plant owned by the petitioner, as we are able to gather from the record, are as follows:

P.U.R.1928E.

Nine miles of line between Rock Hill and York; nine miles of line between Rock Hill and Chester; eleven miles of line between Rock Hill and Lancaster; one-half of the line between Rock Hill and Fort Mill.

The exchanges at York, Chester, Lancaster, and Fort Mill own the remaining portions of the connecting lines which connect with exchanges at those points. These lines of course connect with petitioner's local exchange.

As we understand it, the value of this equipment is put down in petitioner's audit as follows:

Reproduction value	\$7,428.10
Depreciation	1,861.74
Present value	5,566.36

The revenue derived from this property is upon calls originating in Rock Hill to the exchanges at the other ends of the respective lines, each exchange taking the tolls originating at its exchange. There are no intermediate stations on any of these lines. That source of revenue, as is seen, is very distinct and individual. The other source of revenue comes about in this way. The Southern Bell Telephone Company maintains a long-distance line into petitioner's exchange and a switchboard and operator there. There is a line direct from petitioner's switchboard connecting with the Bell Company's switchboard, and when a subscriber desires to make a long-distance call to some point other than York, Chester, Lancaster, or Fort Mill, he is connected with the Bell lines, which company thereafter handles the call and receives the revenue. Calls into Rock Hill from all points except those above stated are brought in by the Bell line and handled the same way except in the reverse order. The Bell Company pays the petitioner a "commission" on all calls originating from petitioner's exchange, amounting to 25 per cent on calls of less than one dollar, and 25 cents on calls of one dollar or more. That source of revenue is likewise very distinct. The two could have been and ought to have been kept separate and separately shown in the audit. The "commission" paid by the Bell Company, while derived from long-distance calls, is the direct product of petitioner's exchange, and there does not appear to be any expense connected with it, which is and ought to be separated
P.U.R.1928E.

from exchange expense. In other words, it is legitimate exchange revenue, because it is compensation for the service the exchange renders in the business of long distance communication, and no part of it is derived from petitioner's toll lines, equipment, or service. Any objections to including the revenue derived from petitioner's toll lines disappear when that feature of the matter is analyzed. As shown above, the "commission" paid by the Bell Company could not be charged with the expense of maintenance, depreciation, taxes, salaries, etc., incident to the toll lines and their operation. Therefore, this expense must be charged where it belongs, that is, to the revenue from the toll lines themselves. Mr. F. S. Barnes testified that for the first six months of 1927 the Bell "commissions" were 52.7 per cent of the toll revenue, and we assume that figure is more nearly correct than previous and more harmful testimony to petitioner given by Mr. Barnes to the effect that the proportion was about one-third from the toll lines to about two-thirds from the Bell "commissions". So applying that ratio to the 1926 audit we have \$7,558.10 total revenue, \$3,983.54 of which would be from "commissions" and \$3,575.36 from the toll lines. If the principles followed in the case of *Houston v. Southwestern Bell Teleph. Co.* 259 U. S. 318, 66 L. ed. 961, P.U.R.1922D, 793, 42 Sup. Ct. Rep. 486, is applied, 25 per cent of the last named amount, or \$893.84 should be credited to the exchange. This amount, plus the Bell "commissions" of \$3,983.54 would give to the exchange out of what is carried in the audit as tolls, the sum of \$4,877.38. The amount of profit shown in the 1926 audit is the sum of \$4,910.84 from the toll revenue, a difference of only \$33.46, which manifestly could have no influence on the main issue of a fair rate.

As a matter of logic, however, we think petitioner's whole operation should be treated as a unit, for the facts in this case are very different from those of the Houston case. There the telephone company owned the exchange and the long-distance lines leading to a large number of points in the state of Texas and into other states, and the long-distance messages went over the telephone company's lines to such points, using property of the telephone company of enormous value, yet 25 per cent of these P.U.R.1928E.

tolls were credited to the exchange at Houston. Here there are only four long-distance lines, the longest of which is 11 miles. It seems to us that the service rendered by the exchange in connection with communication over the petitioner's long-distance lines in and out of Rock Hill is of far more value than that rendered by the toll lines, and that petitioner gains instead of loses by treating its entire business as a unit. If it should be necessary to fix the rate of division between petitioner's toll lines and its exchange, we would be bound to make the division more instead of less than twenty-five per cent. Therefore, since petitioner has no ground to object, we shall include all of the toll revenues in deciding the issues of this case and treat petitioner's entire operation as a unit.

[4] We come to the question of whether or not petitioner is receiving a fair return. Leaving out of consideration, as being unnecessary to decide the case, a number of matters about which respondents complained very vigorously, we shall deal almost entirely with the audits and their explanatory evidence. Petitioner introduced two audits, one covering the year 1926 and one covering the first six months of the year 1927. We think that the audit for the first six months of the year 1927 should be excluded, except where it furnishes evidence not otherwise appearing in the record nor obtainable elsewhere in the record. There are a number of reasons why this should be done. In the first place it covers a period of only six months whereas the unit of time to be covered by the rate is one year. The period of investigation of petitioner's experience should be for a year. To accomplish this result with the six months audit the last half of the year would be as estimate only. In the next place it covers the half of the year when business is less active and in doubling that result the estimate that is obtained is most certainly not a true statement of a year's business. We cannot combine them and take an average of a year, for that result would show two dull periods and only one active period, and we cannot use both because they conflict and one or the other must yield. These suggested difficulties are borne out by comparing the two audits. The 6 months audit shows a decrease in revenue from both tolls and exchange and a rather large and unexplained decrease in the P.U.R.1928E.

number of stations. In view of the history of the company and its constant and sustained growth, this decrease in stations, amounting to 4.75 per cent in six months is surprising. But in the face of these decreases the expenses of the company would show an increase of nearly \$3,000. Still another reason which we think is conclusive that this audit is incomplete is because our investigation is limited to the date of the inquiry. *Willcox v. Consolidated Gas Co.* 212 U. S. 19, 52, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 48 L.R.A.(N.S.) 1134, 15 Ann. Cas. 1034; *Lincoln Gas & Electric Light Co. v. Lincoln*, 223 U. S. 349, 56 L. ed. 466, 32 Sup. Ct. Rep. 271; *Houston v. Southwestern Bell Teleph. Co.* 259 U. S. 318, 66 L. ed. 961, P.U.R.1922D, 793, 42 Sup. Ct. Rep. 486; *Bluefield Water Works & Improv. Co. v. Public Service Commission*, 262 U. S. 679, 67 L. ed. 1176, P.U.R.1923D, 11, 43 Sup. Ct. Rep. 675; *Indianapolis Water Case*, 272 U. S. 400, 71 L. ed. 154, P.U.R.1927A, 15, 47 Sup. Ct. Rep. 144.

This investigation really started in the month of May, 1927. While no formal petition was filed at that time, still the matter had been brought to the notice of the Commission, and it had, in fact, entered on an investigation and had two conferences in the city of Rock Hill, at which a large part of the testimony subsequently taken in the case was heard and efforts were made by the Commission to bring the parties to an agreement upon the basis of the facts as disclosed by the testimony, which was subsequently formally taken.

This covered a period of about three months and when it was found that no agreement was possible, a petition was formally filed and a hearing was conducted pursuant thereto, the last testimony being taken on September 15, 1927, and any consideration given the 1927 audit would involve consideration of facts necessary to determine a fair return, that is, expenses and income to the end of 1927, when the testimony in the case closed on September 15, 1927. Besides, the actual experience and audit for 1926 is better evidence than an audit for one half of 1927 and an estimate for the other half. When the toll line revenue is included and the depreciation calculated upon cost instead of reproduction value, as is done in the audit, even at the rate of depreciation
P.U.R.1928E.

tion adopted by petitioner, it appears that the present rates yield a fair return.

[5, 6] We are of the opinion that the cost of the property is the only possible reasonable authority upon which depreciation can be calculated. Depreciation is a reserve to equalize retirements and not a reserve to equalize replacements. A rate of depreciation based upon original cost, even, is little more than an intelligent guess; but based upon reproduction costs is the blindest kind of speculation. With the known original cost of a unit and an engineer's estimate of its service life and salvage value, based upon his experience and technical knowledge, some semblance of accuracy might be reached. To guess its service life and salvage value is bad enough but who would venture to guess what it would cost to reproduce it ten or twenty years thereafter. Yet to figure a rate of depreciation based upon cost of reproduction, the amount that would be required to replace the unit in question would have to be ascertained because it substantially enters as one of the factors in the determination. Depreciation reserve is intended to keep the investment level but not to insure the hazards of varying future. Calculating the depreciation upon cost then produces quite a different result from that reached by the petitioner. Using the rate of depreciation adopted by the petitioner, averaging 7.7 per cent (which we think is entirely too high) the expense for depreciation amounts to only \$6,180.87 instead of \$15,170.48 making a difference of \$8,989.61 in petitioner's expense account, and if the tolls are added to petitioner's revenue, as we think they should be, the revenue would be \$49,997.88.

[7] Petitioner has included in its expense account \$6,164.31 interest for money borrowed. It does not appear to the Commission that the allowance of such an item can be sustained from any standpoint. If the money borrowed went into the capital account, it is covered by the return allowed on the value of its property; and if it went into maintenance and cost of operation, it is likewise covered by a fair return. We don't see how petitioner could borrow money to build and operate a plant and receive a rate which would allow it to pay the interest on such a fund and make a fair return in addition. Therefore,

P.U.R.192SE.

adding this interest, \$6,164.31, and the excess depreciation \$8,989.61, we have the sum of \$15,153.92 at least which should be deducted from petitioner's expense account, leaving a balance for expenses of \$35,686.60, which deducted from its gross revenue, \$49,997.88, gives a profit of \$14,311.28, which gives a return of 10.79 per cent.

[8] When the Commission reached the conclusions above stated, it voted by majority vote to dismiss the petition, and the result of the vote was announced. However, before a formal order was made declaring these views and the vote thereon, petitioner filed a petition alleging that the cost, as appears in the audit, is not the true original cost, but is an arbitrary figure fixed by the petitioner, without accurate investigation, and for convenience in making returns to the South Carolina Tax Commission and prayed that the case be opened for the purpose of allowing it to show the true original cost. At the hearing upon the last mentioned petition, petitioner submitted a general outline of the evidence it proposed to introduce to establish original cost. It appears from the showing that petitioner proposes to prove original cost by graphic curves showing the fluctuations of basic prices of certain elements of property value, also similar curves showing various all-commodity-price indexes, compiled by the American Appraisal Company of Milwaukee, Wisconsin. The property represented by the first group of these curves from 1913 to 1927, are lumber, cement, brick, structural steel, labor, labor efficiency, wood-working machinery, and machine tools. The all-commodity price index curves compiled from reports of the U. S. Department of Labor, Bradstreets, and Dunns, covering the same period. From this data petitioner proposes to ascertain the value of a dollar for each year since 1913, and apply this valuation to the addition made to the property during each year.

It also proposes to establish if the case is reopened, an entirely different rate base, by including engineering, omissions, and contingencies, interest during construction, and the cost of establishing business, none of which were included in the rate base previously offered, and which adds to it more than \$30,000, and making substantially a new case, and which will require practically a rehearing of the whole matter. We could not open P.U.R.1928E.

the case for the purpose of allowing the introduction of a new and different rate base. Under such a practice there would never be an end to these inquiries, because the losing side can always think of something it ought to have done that was not done. The only matter presented by the petition which has given us great concern is whether or not we should open the case to allow the introduction of new and different evidence of original cost.

[9] It is true that there was evidence that the items of cost shown in the audit did not represent the true original cost, but were carried as "arbitrary figures", and if it is apparent that the evidence of true original cost which petitioner proposes to introduce would change the result, the request that the case be opened ought to be heard with favor, if petitioner is in the position to make such a request. Petitioner had notice all the way through the hearing of the case that the respondents were contending that depreciation should be figured upon original cost, and that the figures appearing in the audit represented such cost, and if its audit did not show the true cost, it ought to have supplied that evidence before it closed its case. But notwithstanding that omission, we would be disposed to open it up for such evidence at this time, if the evidence to be introduced would change the result of the vote already taken; but if, on the other hand, the same result would probably be reached, opening the case would entail a waste of time and energy. It is, therefore, necessary to examine the evidence whose introduction is sought to determine its probable effect upon the disposition of the matter already made.

[10, 11] The value of the evidence upon which we fixed original cost, in our opinion, is much higher than that proposed to show the true and corrected cost. It is found in the audit made by petitioner for the purpose of being used as evidence to show that it is entitled to an increase in rates. While it might be true that at the time the audit was made, petitioner did not realize the influence of original cost upon its application, still that would be no reason for not stating it accurately, if it could be done. The fact that the significance of original cost was not understood when the audit was made should tend to free the statement of it from doubt and add to rather than subtract from its value as evidence.
P.U.R.1928E.

If cost could not be stated accurately, why state it inaccurately or why state it at all? These figures had to come from some record kept by petitioner. To say that they did not, would be to charge petitioner with the act of putting into his audit, to be used as solemn testimony, figures that represented nothing and came out of the imagination of petitioner's agents. If they came from records, even though for tax purposes, why would not these records be reasonably accurate? We think that there is testimony tending to show that they are. Mr. F. S. Barnes, who characterized them as "arbitrary figures" has explained his meaning of that term, namely, "that if actual figures had been used, the amount of the investment in those accounts would have been kept and carried out to the dollar and cents, but in the balances for capital investment, they were not accurately posted on those books, and were carried out in thousands and hundreds of dollars and carried as arbitrary figures." If that means anything, it means that in the accounts of capital investment the thousands are absolutely accurate, and the hundreds are never decreased, but increased if the tens and units are more than fifty, or that the tens and units are disregarded leaving the hundreds accurate. And we think the former method the more apt to be followed. Such a method, while not accurate, ought to give a fair approximation. But in the audit these items are carried out to the dollar and cents, which does not square with Mr. Barnes' definition. This forces the conclusion that they came from some record of the petitioner, unless they are the result of a method of allocation adopted by it from the records described by Mr. Barnes, and in either case, in the light of his explanation of the term, would represent a figure near enough to the truth to enable us to determine the issues presented.

[12] Not so with the price index curve. This is a composite delineation of the prices of all commodities and would be influenced by abnormal prices of a number of commodities in widely separated markets which never could enter petitioner's plant, such for instance as long staple cotton, during and immediately after the war, and Florida real estate. Any abnormal boost in prices of any commodity in any market at any time during the period covered would be found represented in these curves.

P.U.R.1928E.

Manifestly we could not determine original cost by such a method, and we think, as evidence, it is of no value whatever.

[13-15] But suppose it is established that petitioner's plant did cost \$188,661.15, the figure it proposes to prove by these curves. We then should be obliged to adopt and apply an average rate of depreciation which appears to us to be reasonable. Such a rate, under the facts of this case, could not be more than five per cent. The reason for that seems obvious. Petitioner is spending on the maintenance, repairs and upkeep of its property, as appears by 1926 audit, \$9,018.81, and practically the same amount for 1927, by that audit. The depreciation which it claims upon the new basis of cost is the sum of \$15,237.41, making a total for all these items of \$24,256.22. In other words, for upkeep and depreciation, petitioner proposes that we allow an annual sum that would enable it to reproduce its entire plant, new, in about eight (8) years. A rate which would produce that result appears to us to be unreasonable. Where so much money is spent each year on upkeep, it ought to appreciably prolong the life of the various units and is bound to do so. So that we think, under the circumstances, an average rate of approximately five per cent should be ample to protect the depreciation which the property would suffer. Applying that rate to the proposed basis of cost, \$188,661.15, would give for depreciation \$9,434.05, and with the adjustment of its expense account accordingly, would, at the present scale of rates, yield a profit of \$11,058.10, or \$440.37 above a return of 8 per cent.

It is, therefore, our opinion that the petition to open the case should be denied and the petition for an increase in rates be dismissed.

We have not allowed the expense item for income tax for the reason that if we allowed a rate to cover income tax, it would be equivalent to an absolution of petitioner from paying any income tax at all.

P.U.R.1928E.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.**COLUMBIA RAILWAY, GAS & ELECTRIC COMPANY***v.***STATE OF SOUTH CAROLINA et al.**

[No. 2737.]

COLUMBIA RAILWAY, GAS & ELECTRIC COMPANY**et al.***v.***SAME.**

[No. 2738.]

(27 F. (2d) 52.)

Public utilities — Street railways.

1. A street railway company is a public service corporation owing its existence to the governmental power of eminent domain, and charged with the duty of so maintaining and conducting the enterprise in the interest of the public, subject to the control of the proper authorities in the matter of conducting their properties, as well as in the remuneration to be received therefor, p. 240.

Franchises — Capacity of utility possession — Street railways.

2. Special privileges conferred upon utilities in consideration for their providing facilities for public communication and intercourse are held by the utility as agents and trustees for the sovereign power, and are in no sense private, p. 240.

Service — Duties of utility.

3. Public service corporations may not, by their acts, disable themselves from performing the functions which were to be rendered in consideration of their public grant, p. 240.

Bankruptcy — Street railways not to take advantage of act.

4. To attempt to wind up with the summary methods contemplated in bankruptcy proceedings, the affairs of a street railway company would cause great financial loss to creditors and serious embarrassment and inconvenience to the public, owing to the discontinuance of service, and such corporations should, therefore, not be permitted to avoid their obligations through the bankruptcy act, p. 241.

Bankruptcy — Street railway a railroad within meaning of act.

5. A street railway company is a railroad within the meaning of the Federal Bankruptcy Act prohibiting railroad corporations from being adjudicated bankrupt, p. 242.

Railroads — Interurban railway relationship with railroad.

6. A traction company operating over about 20 miles of electric P.U.R.1928E.

trolley lines in and about a metropolitan area of a particular city and neighboring communities was held to partake more of the nature of a railroad than that of a simple street railway serving one community in so far as the Federal Bankruptcy Act excludes railroads from taking advantage of its provisions, p. 248.

Bankruptcy — Discontinuance of service by street railway.

7. The voluntary discontinuance of a street railway company prior to the initiation of proceedings in Federal Bankruptcy Court was held not to change the status of the utility in such a manner as to entitle it to become a bankrupt notwithstanding the prohibition against such companies availing themselves of the provisions of the Bankruptcy Act p. 248.

Injunction — Dismissal of Federal bankruptcy proceedings.

8. A stay of proceedings in state court against a utility pending a determination in Federal Court of a petition for voluntary bankruptcy is automatically ineffective and properly vacated upon the dismissal in Federal Court of such bankruptcy petition, p. 248.

[June 12, 1928.]

APPEAL by street railway utility from decree of Federal District Court dismissing bankruptcy petition; order of District Court affirmed.

Appearances: W. C. McLain and J. B. S. Lyles, both of Columbia (George M. Le Pine and C. Edward Paxson, both of Reading, on the brief), for appellants; Irvine F. Belser, of Columbia, and Cordie Page, Assistant Attorney General, of South Carolina (John M. Daniel, Attorney General, of South Carolina and Melton & Belser, C. T. Graydon, W. S. Nelson, and Colin S. Monteith, all of Columbia, on the brief), for appellees.

Before Waddill, Parker, and Northeott, Circuit Judges.

Waddill, Circuit Judge: These two appeals were heard together upon a single record and will be so disposed of in this court. The litigation involves the properties of the Columbia Railway, Gas & Electric Company, and the operation of the same, and arises particularly in the bankruptcy proceeding pending in the United States District Court for the Eastern District of South Carolina, and upon the orders and decrees seeking to stay certain proceedings pending in the supreme court of South Carolina also affecting said properties.

The Columbia Railway, Gas & Electric Company was created by act of the South Carolina legislature of September 16, 1891
P.U.R.1928E.

(20 Stats. at Large, p. 1453), authorizing the merger and consolidation into one company of the franchises and powers of various public service corporations, whose franchises and functions are fully described in the opinion of the court below (24 F. (2d) 828), to furnish the public utilities with gas, electric light and power, and transportation service to the city of Columbia, South Carolina, and vicinity, under authority duly secured for that purpose. The corporation so created operated a passenger service on the electric trolley lines constructed by it and the other companies whose properties it had acquired, in Columbia and other neighboring towns and communities, namely, the villages of Arden, Eau Claire, and Shandon, the system having a total trackage of about twenty miles. The company also furnished gas, electric light, and power to the public, having acquired the power plant of the Congaree Electric & Power Company under the aforesaid merger act of 1891.

In June, 1925, under authority of the act of the South Carolina legislature of March 19, 1925 (34 Stats. at Large, p. 842), the Columbia Railway, Gas & Electric Company executed a deed purporting to convey to the Broad River Power Company which owned all the common stock and a majority of the preferred stock in the Columbia Railway, Gas & Electric Company, all its gas, electric light, power, and other property rights and franchises, except certain rights and properties connected with the railway service. After such transfer, the Columbia Railway, Gas & Electric Company continued only a railway passenger service, until March 11, 1927, when it discontinued all railway operations.

A mandamus proceeding was instituted on July 19, 1927, in the supreme court of the state, by the state of South Carolina, to compel the Columbia Railway, Gas & Electric Company, the Broad River Power Company, and F. D. Campbell, president and general manager of both companies, to resume the railway service. Other parties interested in the furnishing of transportation in the city of Columbia were allowed to intervene in said proceeding. On July 28, 1927, 49 Ann. Rep. S. C. R. C. 41-A, P.U.R.1927D, 684, the South Carolina Railroad Commission, which had been petitioned by the Columbia Railway, Gas & P.U.R.1928E.

Electric Company to be allowed to discontinue its railway service, issued an order directing the railway company and the Broad River Power Company to restore the service abandoned on March 11, 1927, saying in its order that it appeared that the power company had undertaken to strip the railway company of its assets and had left it with its liabilities, and that the transaction was apparently one of bad faith, and subject to be set aside by law. On January 11, 1928, the state supreme court entered an order referring all issues of law and fact in the proceeding before it to a special referee, who fixed a hearing for January 25, 1928.

On January 24, 1928, the Columbia Railway, Gas & Electric Company filed its petition in the District Court for the Eastern District of South Carolina, praying that it be adjudicated a voluntary bankrupt. It also filed in the District Court its petition praying for a stay of the proceedings in the state court. The railway company was on that day duly adjudicated a bankrupt, and a temporary stay of the proceedings in the state court was granted, and the petitioners therein required to show cause on January 28, 1928, why such state should not continue in force pending the bankruptcy. Return was made to such order, and thereupon Broad River Power Company appeared and filed its petition, joining in the relief prayed for by the bankrupt. On January 25, 1928, the special referee appointed in the state court proceedings adjourned the reference thereto, subject to the further order of the referee. The District Court, by an order dated February 2, 1928, continued in force its former stay order of January 24, 1928.

On February 8, 1928, upon considering the return to the rule made on January 28, 1928, by the state of South Carolina, and others, and also upon the petition of the state of South Carolina to vacate and set aside the order of adjudication, the District Court awarded its rule returnable on the 1st day of March, 1928, before the judge in his chambers at Charlestown, South Carolina, to show cause why the relief prayed for should not be granted. Thereafter, on the 13th of March, 1928, the District Court filed its written opinion, holding that the bankrupt corporation was not entitled to the benefits of the bankruptcy law, and P.U.R.1928E.

accordingly, by order of March 13, 1928, vacated, revoked and set aside said adjudication. The Columbia Railway, Gas & Electric Company appealed from this action on March 16, 1928, which is the first case, No. 2737.

On April 2, 1928, the District Court (25 F. (2d) 329) also dissolved and revoked its stay orders of January 24 and February 2, 1928, from which action the appeal in the second case, No. 2738, was taken by the Columbia Railway, Gas & Electric Company and the Broad River Power Company. The assignments of error in the two cases will be considered separately. Those in No. 2737 are in substance as follows:

First. That the court erred in holding that the term "railroad corporation," contained in § 4a of the Bankruptcy Act 11 USCA § 22 (a), included street railway corporations, particularly the bankrupt, and that said corporation was not entitled to be adjudicated a voluntary bankrupt; second, that the trial court erred in holding that the corporation was not entitled to be adjudicated a voluntary bankrupt inasmuch as the company had for more than a year theretofore actually discontinued the operation of its street car service; third, that the court erred in holding that the Columbia Railway, Gas & Electric Company partook more of the nature of a suburban or interurban street railway than of a simple street railway in one town or city, and instead should have held that the corporation was a local street railway corporation serving a single community, and was as such entitled to be adjudicated a voluntary bankrupt; fourth, that the court erred in determining that at the time of the bankruptcy the street car railway was engaged in the operation of any of its lines outside of the city of Columbia other than those of the towns of Eau Claire, Arden, and Shandon, and a branch line to the Ridgewood Country Club.

These four assignments of error may be simplified by considering assignments 1 and 3 together, and assignments 2 and 4 together. The crucial question to be determined is whether the appellant, the Columbia Railway, Gas & Electric Company, is such a railroad corporation as brings it within the provisions of the Bankruptcy Act; that is to say, is the corporation one to which the benefits of the bankruptcy law is extended? If it is,

P.U.R.1928E.

the action of the District Court complained of, holding to the contrary and vacating and annuling the order of adjudication of the appellant as a bankrupt, should be reversed; and, if otherwise, such action—that is, holding the appellant not subject to the Bankruptcy Law, nor entitled to be adjudicated as such—should be affirmed.

The importance of this question, and the large class of those affected by its correct determination, can be better appreciated when the vast number of corporations operating street car lines and those interested therein, whether as owners, operatives, debtors, creditors, or the general public, are taken into account. The character of the business involved (that is, the operation of street car lines) and the law sought to be invoked in its behalf (that is, the national Bankruptcy Act [11 USCA]) should be kept in view. There is a concessum that railroads proper cannot be adjudged bankrupts. This is apparent from the plain letter of the bankruptcy statute, and seems to be conceded otherwise because of the character of the corporations and the vastness and extent of their operations. But it is earnestly insisted that street car systems are not within the meaning of the Bankruptcy Act, and that because of this fact, and that they are as a rule less extensive in their operations, a different rule should prevail as to them.

[1-3] We are not inclined to acquiesce in either of these views, for the reason that in our judgment different considerations control. Both the railroad and the street car companies are public service corporations; that is to say, they owe their existence to the sovereign power, they exercise in the construction and maintenance of their lines the governmental power of eminent domain, they are created, it is true, for the purpose of making money for the owners, but they furnish labor to those seeking employment, and primarily they are created and organized in the interest of the public and are charged with the duty of so maintaining and conducting the enterprise under the supervision and control of the legislative and executive authorities of the state and municipalities they serve, and are subject to their police control as well in the matter of conducting their properties as in the remuneration to be received by them therefor. They have conferred upon them special privileges in consideration of their provi-

ing facilities for communication and intercourse with the public. "These rights . . . are held by the grantee, the holder of the franchise, as the agent and trustee for the sovereign power, and are in no sense private, but continue after as well as before, the grant to be but a portion of the public interests." State ex rel. Grinsfelder v. Spokane Street R. Co. 19 Wash. 518, 53 Pac. 719, 41 L.R.A. 515, 67 Am. St. Rep. 739; and the corporations may not, by their own acts, disable themselves from performing the functions which were in consideration of the public grant. York & M. Line R. Co. v. Winans, 17 How. 31, 15 L. ed. 27; Thomas v. West Jersey R. Co. 101 U. S. 71, 25 L. ed. 950; State ex rel. Grinsfelder v. Spokane Street R. Co. (*supra*); Farwell Farmers' Warehouse Asso. v. Minneapolis, St. P. & S. Ste. M. R. Co. 55 Minn. 8, 56 N. W. 248.

It is true that the general designation of railroads contemplates an extended system sometimes covering an entire state, and not infrequently several states. The ordinary street car system or street railway none the less materially and vitally affects those within the legitimate sphere of its activities, less extensive though it may be, and indeed, most frequently, by reason of the close relation that the street car system has to the public, its control and regulation becomes a matter of more immediate concern to those directly affected thereby than if the service was more extended.

[4] Public service corporations, especially railroads and street car lines, are rarely, if ever, disposed of in case of financial difficulties by sale upon the auction block, but almost invariably in foreclosure proceedings in equity, where their financial difficulties are adjusted, other securities issued, and the system continued, receivership certificates being issued pending the time necessary to effect such reorganization. *Re Hudson River Power Transmission Co. (D. C.)* 173 Fed. 934, affirmed, 106 C. C. A. 139, 183 Fed. 701, 704, 33 L.R.A.(N.S.) 454. To attempt to wind them up with the summary methods contemplated in bankruptcy proceedings, selling the property and paying what is left, if anything, to the creditors, would nearly always result in great financial loss to the creditors and serious embarrassment and inconvenience to the public whom the line

P.U.R.1928E.

served, and largely in whose interests they were brought into being and constructed.

This very company is a striking illustration of what would result if such methods were inaugurated. The suburbs of the city of Columbia have been largely extended and built up, as have also the three or four towns and villages served, by this line chartered and operated by public authority, these communities now numbering some 60,000 people. The summary discontinuance of the service would result in great loss and hardship upon those who have acted upon faith in the continuance of the same, and would leave them without any substantial relief or effective plan of intercommunication. This unsatisfactory condition should not be augmented by enabling the corporation, after it has become involved in apparently hopeless financial embarrassment and trouble, to quietly declare itself a bankrupt and seek to avoid liability for its debts and obligations through the aid and authority of the bankruptcy court, which enforces and administers the bankruptcy law, not concurrently with, but exclusive of, other courts.

[5] These considerations doubtless influenced the Congress in not extending to railroad corporations the benefits and provisions of the Bankruptcy Law. The character and extent of relief afforded under that law should be taken into account in considering this question. The bankruptcy law is a part of the Federal judicial system that looks to the prompt reducing of the assets of those overtaken by financial disaster to money, winding up the estate and discharging the debtor. It is about as little suited to deal with the operating and winding up of public service corporations, having regard to the public's interest and convenience, and the rights of the public generally respecting such properties, as any method could well be, and we think it may be fairly concluded from that law and the method and conduct of disposing of the properties of such public service corporations that Congress never for a moment contemplated that the provisions of the Bankruptcy Law should be availed of by street railway systems. The history of the Bankruptcy Act itself will tend to show this to be true.

P.U.R.1928E.

The present Bankruptcy Act of 1898 (30 Stat. p. 547, § 4) provided:

"a. Any person who owes debts except a corporation shall be entitled to the benefits of this act as a voluntary bankrupt.

"b. Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of \$1,000 or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. Private bankers, but not national banks or banks incorporated under state or territorial laws may be adjudged involuntary bankrupts." By the amended Act of 1903 (32 Stat. p. 797, § 3) the provisions as to involuntary bankruptcy were extended to include mining corporations; subsequently the amendment of June 25, 1910 (36 Stat. p. 839), was enacted, providing that any person except a municipal, railroad, insurance, or banking corporation might become a voluntary bankrupt, and the amended act also substituted for the words "and any corporation engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits," the words, "any moneyed business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation." It will thus be seen that not until the amendment of 1903 were corporations permitted to become voluntary bankrupts at all, and after that amendment, by the Act of 1910 the present enlarged provision was made. Title 11, § 22, p. 250, USCA.

The meaning of the words "railroad corporation" has been frequently the subject of consideration by the state and Federal Courts, and while such decisions have not always been in harmony, and not infrequently have been at variance one with the other, depending largely upon the circumstances and character of the several cases, and how they arose, whether under the charters of such corporations and the effort to avoid liability arising thereunder, or in the enforcement of government rules and regulations respecting the same, still it may be said that the word "railroad" when considered in its generic sense includes

P.U.R.1928E.

street railways; that is to say, that where there is nothing to indicate that the word is used in a restricted sense the same should be given its broadest signification.

Sight should never be lost of the fact that railroads and street car companies as a rule are distinguishable from other corporations in that they are public service corporations, engaged in the business of transporting passengers by rail. This is a matter peculiarly of public interest and importance, in that whole cities and communities are dependent upon the facilities afforded for the carrying on of their daily activities, and they are distinguishable, moreover, in that, being public service corporations by legislative authority and exercising the power of eminent domain, they may take private property for the use of their tracks and other purposes, or lay their tracks upon the public streets and highways, which latter they most frequently do. *York & M. Line R. Co. v. Winans*, 17 How. 31, 15 L. ed. 27; *Massachusetts Loan & Trust Co. v. Hamilton*, 32 C. C. A. 46, 88 Fed. 588; *Bloxham v. Consumers' Electric Light & Street R. Co.* 36 Fla. 519, 18 So. 444, 29 L.R.A. 507, 51 Am. St. Rep. 44; *Gyger v. Philadelphia City P. R. Co.* 136 Pa. 96, 104, 20 Atl. 399; *Shreveport Traction Co. v. Kansas City S. & G. R. Co.* 119 La. 759, 773, 44 So. 457. See also *Talcott v. Pine Grove*, Fed. Cas. No. 13,735, 1 Flip. 120; *Savannah T. & I. of H. R. Co. v. Williams*, 117 Ga. 414, 43 S. E. 751, 61 L.R.A. 249; *Booth's Street Railways*, § 1; *Nellis on Street Railways*, Vol. 1, § 3.

The use of the language "railroad corporation" among those designated as municipal, insurance, and banking corporations in no sense restricts the meaning of the words, but, on the contrary, shows that insurance and banking corporations, which are less of a general public character as well in the matter of their use and operation as the regulation thereof, than street car companies, are denied the right to avail themselves of the Bankruptcy Law.

If street car companies can be adjudicated as bankrupts under the laws of the United States, we can but be impressed with the paucity of judicial decisions on this subject. In the last quarter of a century there has perhaps been no class of property subject
P.U.R.1928E.

to greater vicissitudes and financial embarrassments than these large and valuable interests scattered throughout the entire country, and if the right of bankruptcy existed in behalf of those interests, the same would have been constantly availed of. Our attention has been directed to but one case so holding, that of *Re Grafton Gas & Electric Light Co.* 253 Fed. 668, a District Court decision from the Northern District of West Virginia. The case of *Omaha & C. B. Street R. Co. v. Interstate Commerce Commission*, 230 U. S. 324, 57 L. ed. 1501, 33 Sup. Ct. Rep. 890, 46 L.R.A.(N.S.) 385, gives some support also to the contention made by appellant. A careful review, however, of these cases will at least demonstrate that they do not sustain the contention that a street car company such as the one here may avail itself of the benefits of the bankruptcy law. The last-named case arose under the Interstate Commerce Act (49 USCA §§ 1-22, 25-27; Comp. St. § 8563 et seq.), and neither under the facts of the case nor the provisions of the act materially affects the question at issue in this case, of the right to put a street railway corporation into bankruptcy. While the first-named decision is strictly a case of a street car line, it does not throw great light on the question in this case because of the comparative shortness of the line in that case and the small community served by it.

We can but feel that under the plain provisions of the Bankruptcy Act, the same has no application to street car lines of the character under consideration here, and that, on the contrary, they are expressly excepted therefrom; that from every consideration, having regard to the public character of the street car system, the service it is obligated to render the public, and the burdens it assumed in thus becoming a public service corporation amenable especially to the laws of the sovereignty creating it, it cannot be adjudicated a bankrupt. Many authorities might be cited to support this general conclusion, but only a few need be referred to in detail. The case of *Central National Bank v. Worcester Horse R. Co.* 95 Mass. (13 Allen) 105, 106, will be found to be of special interest, in which the Supreme Judicial Court of Massachusetts said as follows:

"In our opinion it is clear that they [horse or street railroads]
P.U.R. 1928E.

must fall within the exception of 'railroad corporations,' and not within the general class of corporations, out of which railroad corporations are excepted. The chief characteristics of a railroad corporation, under the laws of this state, are that it is created mainly for the public benefit, and only incidentally for its own profit; intrusted with the public right of eminent domain for the purpose of taking land, at least outside of the common highways, and of laying iron rails and preparing the soil to support them; authorized and directed to carry passengers for fares in its own cars over its own rails; punishable for transgression of the rules prescribed for the public safety and convenience, and protected from interference with its rights, by indictment in behalf of the public; obliged to transport the cars and passengers of other similar corporations on terms fixed by Commissioners appointed by this court; having a franchise which cannot be alienated, absolutely or in mortgage, without permission of the Legislature; required to make annual returns showing its pecuniary condition and the mode in which it has discharged its public duties; and bound to surrender its charter and property to the public upon being paid a sum sufficient to reimburse its expenditures, and a reasonable interest or profit. A 'horse railroad company,' or, as it is more frequently and more appropriately called in the recent statutes, a 'street railway corporation,' has all these attributes; and is not the less a 'railroad corporation,' less public in its character, or more fit to have its franchise and property transferred to assignees under proceedings in insolvency, because (as its very names imply) it more generally uses horses, instead of steam power, to draw its cars; and lays its rails over land already devoted to the public use for a street or highway, and is, therefore, made by statute peculiarly subject in the location and use of its tracks to the regulations of the municipal authorities."

In the case of *New England Engineering Co. v. Oakwood Street R. Co.* 75 Fed. 162, 164-166, a decision of the United States Circuit Court, Sixth Circuit, arising under the mechanics lien law of the state of Ohio, consideration was given to the question whether the word "railroad" included street
P.U.R.1928E.

railways. The learned judge, now Mr. Chief Justice Taft, held that it did, saying as follows:

"The contention is that the term 'railroad,' as used in this section, refers to commercial or traffic railroads, as distinguished from 'street railways.' It is said that in the statutes of Ohio the *usus loquendi* requires that the term 'railroad,' when used without qualification, should be held to mean commercial or traffic railroads, and not those which are used for passenger purposes upon the streets of cities and villages. . . . We are to determine from the association in which the term occurs whether street railroads would naturally be included within it. I am very clear that the doctrine, '*Noscitur a sociis*,' establishes that the word 'railroad,' in this connection, includes 'street railroads.' . . . It is very clear to me that the narrowest construction of the statute in question would not exclude street-railway companies from its operation."

As heretofore stated, the Bankruptcy Act excludes from its benefits municipal, insurance, and banking corporations, the last-named two of which are of a less public character than street car companies. In *Minneapolis Street R. Co. v. Minneapolis* (C. C.) 155 Fed. 989, 995, it was held that a street railway corporation was included within the term railways and brought within the statute regulating the formation of corporations. Judge Lochren, long the able and distinguished judge of the District Court for the District of Minnesota, said:

"As I said before, a street railway is a corporation of that character. It is a quasi public corporation. Its duties are to render public service. Now, it is true that street railways, by that name, are not mentioned in title 1. Railways are mentioned as the very first kind of business that is named in the title. It also includes 'any other public improvement,' any association formed for the purpose of carrying on the work of public improvement; but it seems to me that the title of 'railways,' without more, covers the case of street railways. In other words, that 'railways' is a generic title which covers all kinds of railways. A railway is a way which is made for the movement of cars, or something of that character, upon tracks that are laid down either on the street or somewhere else. They are not pro-

pelled as ordinary vehicles, such as wagons and carriages, are on the highways generally, but require for their operation that tracks be expressly formed to be moved upon, and a street railway is of that character. Therefore, it is distinctly a railway. Now, there is nothing in that statute which would indicate that street railways were not included in it. They are railways. They perform public functions. It is proper to invest them with the power to exercise the right and power of eminent domain. There is no reason in the world why they should be omitted."

[6] Upon considering assignment of error No. 3 to the court's conclusion that the Columbia Railway, Gas & Electric Company in its nature partook more of a suburban or interurban street railway than of the simple street railway in one town or city, we are inclined to concur with the court in that ruling, and we are also in accord with its views under assignment No. 1 as to the exclusion of the street car companies generally from the provisions of the Bankruptcy Law.

[7] Concerning assignment No. 2, we think the court's ruling to the effect that the street railway company, having discontinued service upon its car lines at the time of the inauguration of the bankruptcy proceedings, was not thereby entitled to be put into bankruptcy, is correct, and the assignment, therefore, is without merit.

Regarding assignment No. 4, the views expressed by us in disposing of assignments 1 and 3 in effect answer this assignment, and show the same to be without merit.

The decision of the learned judge of the District Court in this appeal, No. 2,737, will be found reported in 24 F. (2d) 828, to which reference is made as containing an able and comprehensive discussion of the law applicable to the subject under consideration.

[8] The appeal in No. 2738 is brought by the Columbia Railway, Gas & Electric Company and the Broad River Power Company from the order of the court vacating and annulling its order theretofore entered, staying the proceedings in the state court pending bankruptcy. The assignments of error, from our viewpoint, are without merit, since under our ruling approv.
P.U.R.1928E.

ing the court's action in setting aside the order of adjudication, denying the bankruptcy and dismissing the petition praying therefor, it follows that the right to stay proceedings in the state court no longer existed, and that the same became ineffective upon the dismissal of the bankruptcy proceeding.

The action of the District Court will be affirmed in both appeals, at the expense of the appellants therein.

Affirmed.

Note.—Public Utilities.

I. In general, 249.

II. What constitutes a utility:

a. In general, 249.

b. Contract carriers, 251.

III. What constitutes public service, 252.

IV. Corporate status, 253.

I. In general.

The Commission acquires jurisdiction of a privately owned and operated telephone exchange and has the right to grant or refuse the new exchange a certificate of convenience and necessity where it attempts to make physical connection with any other existing exchange. *Re Waterloo Line* (Ind.) No. 9195, March 30, 1928.

It was held in *Re Caplan* (N. H.) J-200, June 2, 1927, that the owner of a bus line is responsible for violations of the rules and regulations governing the operation of motor vehicles as common carriers by those he places in control of operations, whether or not he had actual knowledge of such violations.

In *Klinkenstein v. Third Avenue R. Co.* 246 N. Y. 327, 158 N. E. 886, Nov. 22, 1927, the New York court of appeals decided that the provisions of the Public Service Commission Law and of the greater New York charter relating to franchises for common carriers were passed in the interest of the public but not for the direct safety and welfare of persons on the streets such as a street railway or its motor-men.

II. What constitutes a utility.

a. In general.

A parcel delivery company incorporated to carry on the business of a private carrier under contract with parties voluntarily selected, which has reserved and exercised the right of selection and which does not hold itself out to serve the public generally, in the absence of evidence that contracts were made or attempted to be made to an P.U.R.1928E.

unlimited number, or that its operations were not in good faith, is a private carrier over which the Commission has no jurisdiction. *Coronado Transfer v. United Parcel Service (Cal.)* Decision No. 19377, Case No. 2407, Feb. 17, 1928.

To impress upon one the character of common carrier it must be shown that he holds himself out as such to the world; that he undertakes generally and for all persons indifferently to carry goods and deliver them for hire; and that his public profession of his employment be such that if he refuses, without some just ground, to carry goods for any one, in the course of his employment and for a reasonable and customary price, he will be liable to an action. *Ibid.*

A company rendering a store-door pick-up and store-door delivery service for the transportation of freight between two cities, consolidating individual packages into one shipment moving by railroad at tariff rates, is an express corporation within the meaning of § 2 (k) of the California Public Utilities Act. *Re Frost & Co.* Decision No. 19664, Case No. 2519, April 23, 1928.

Whether a rail carrier perform service for an express corporation under contract or at the regular tariff rates is not material to the determination of the status of the latter under § 2 (k) of the California Public Utilities Act. *Ibid.*

An individual transporting by truck films, lobby displays, etc., from film exchanges to theaters, under verbal contracts, with rates based on personal ancillary services as well as on the weight of package and distance to be transported, the transportation being incidental to the personal service, such as selection of films, etc., is operating as a private carrier. *Hare v. Gilboy (Cal.)* Decision No. 19613, Case No. 2443, April 13, 1928.

In *Lande v. Napa Ranch*, Decision No. 19065, Case No. 2195, Dec. 1, 1927, the California Commission held that where the prior owner of a ranch had obtained a franchise, installed a water system supplied from the waters of the ranch, and water had been supplied to consumers for some twenty-seven years, new consumers being taken on only to the extent that old consumers discontinued service, and monthly charges were made for water, the present owner of such system was rendering a public utility service regardless of the fact that rates, rules and regulations had never been filed with the Commission, and in spite of the contention that the water supplied was surplus water, and that no obligation existed to improve the quality of the service.

A railroad company which has withdrawn from public use in the transportation of persons or property a railroad line which it was authorized by the Interstate Commerce Commission to abandon, is not a public utility within the meaning of the main statute providing P.U.R.1928E.

for the sale of public utility property. *Re York Harbor & Beach R. Co.* R. R. 1384, Jan. 30, 1928.

The New Hampshire Commission held that a manufacturing concern which furnishes electricity without charge to seven houses owned by it, solely for the convenience of its employees, and had not held itself out to serve the public generally was not a public utility. *Re Spaulding & Frost Co.* D-1114, Order No. 1924, July 7, 1927.

A farmers' exchange rendering telephone service in a territory to the practical exclusion of other companies having long distance toll connections which put them on a commercial basis was held to be a public utility subject to the appropriate laws therefor. *Re Commonwealth Teleph. Co. (Wis.)* U-3597, April 17, 1928.

A voluntary association procuring power service on contract and prescribing conditions and assessing charges for service connections becomes a public utility which must file its schedules with the Commission. *Otto v. Wisconsin Pub. Service Corp. (Wis.)* U-3406, Feb. 12, 1927.

A municipal water department is a public utility in so far as the supplying of water to consumers in another municipality is concerned. *Re Shorewood Water Dept. (Wis.)* U-3017, Feb. 28, 1927.

An operator of a passenger sedan who furnishes service only on charter or hourly rates is not a "public utility" within the meaning of an act (March 4, 1913, 37 Stat. 974) authorizing the Commission to regulate all "public utilities" including "common carriers" and a Commission order to such operator to carry insurance and to equip his car in a certain manner is unauthorized. *Bell v. Harlan*, No. 4514, 20 F. (2d) 271, May 26, 1927.

b. Contract carriers.

An individual operating motor trucks under alleged verbal contracts made for no specific period of time or for any specific volume or amount of tonnage, carrying no obligation on the part of the shipper to patronize the service, was held to be operating trucks as a common carrier. The California Commission accordingly ordered the operations in question to cease and copies of the said order were forwarded to the district attorneys of the counties in which such operation was conducted. *Bakersfield & Los Angeles Fast Freight Co. v. Willhour*, Decision No. 19508, Case No. 2394, March 21, 1928.

In *Board of County Comrs. of Weld County v. Capron (Colo.)* Case No. 337, Decision No. 1540, Jan. 4, 1928, a complaint against alleged illegal motor carriage was dismissed with the consent of complainant where the counsel for the defendant stated that he was engaged exclusively in hauling merchandise for a chain store company and under employment by them, and that he did not intend to and would not carry for any other persons or act as a common carrier. P.U.R.1928E.

ANNOTATION.

A person who hauls merchandise and goods for others at uniform rates and who is understood by the public to hold himself out as engaged in such a business is engaged in common carriage. The fact that he may make verbal contracts with his customers and may refuse to handle goods not in his usual line is not conclusive. He may have no advertised place of business and may not solicit patronage, yet if this is his sole occupation and he holds himself out as prepared to serve all who apply to him, he is engaged in common carriage for which a certificate is required. *Erb v. Public Service Commission*, — Pa. Super. Ct. —, April 16, 1928.

Commenting on the inability of a motor carrier to depart from the schedules and rates through the medium of a contract the Wisconsin Commission states: "An auto transportation company as defined in Chap. 194 of the statutes is required by that chapter to furnish safe and adequate service and facilities at just and reasonable rates as determined by the Commission. When the Commission has so determined and authorized the rates, the auto transportation company cannot lawfully deviate therefrom as to transportation service furnished between points on the route covered by its certificate, and its duty in this respect cannot be avoided under the guise of alleged contracts nor by the use of vehicles not covered by permit." *Re Schauer's Fast Freight*, AT-10, Sept. 1, 1928.

A motor transportation company carrying only pursuant to special contracts moving picture films from and to film exchanges and from theater to theater, and not advertising or soliciting business nor holding itself out to transport for the public indiscriminately, but operating over fixed routes through a definite territory, is a private carrier and is not a common carrier as defined by Public Acts 1923, No. 209, § 3. *Film Transport Co. v. Michigan Pub. Utilities Commission*, 17 F. (2d) 857, Feb. 24, 1927.

III. What constitutes public service.

The California Commission has decided that although the revenue obtained from storage is nominal, a feed and grain corporation also engaged in a public utility storage business must obtain permission to issue securities. *Re Ontario Feed & Milling Co.* Decision No. 19643, Application No. 14479, April 20, 1928.

Extortion, fraud, imposition, discrimination, and other abuses are grounds for the regulation of private business by the state but do not warrant price fixing. *Ribnik v. McBride*, No. 569, U. S. Adv. Ops. Oct. Term, 1927, p. 614, May 28, 1928.

The operation of an employment bureau is not a business so charged with public interest as to give the state power to regulate its rates for service. *Ibid.*
P.U.R.1928E.

IV. Corporate status.

Under the Public Utilities Act of California (§ 26) a foreign corporation is not entitled to transact a public utility business within that state. *Re Albers Bros. Milling Co.*, Decision No. 19874, Application No. 14706, June 11, 1928.

Only at the instance of the state may advantage be taken of the fact that a public utility company has exceeded the limitation of its charter in the amount of property which it has accumulated. *Re Norway Water Co.* (Me.) U-902, Dec. 9, 1926.

It is legal to permit one partner to pay more for the operation of his busses if both partners agree that such procedure is necessary where the entire profits of the line go into a general fund to be divided between the partners daily. *Re Akers and Diehl* (Mo.) Case No. 5412, Jan. 2, 1928.

UNITED STATES DISTRICT COURT, D. MASSACHUSETTS.**CAMBRIDGE ELECTRIC LIGHT COMPANY**

v.

HENRY C. ATWILL et al.

[No. 2931.]

(25 F. (2d) 485.)

Injunction — Legality of state act assumed.

1. Governmental acts within the general power of the state are presumptively valid, and ought not to be interfered with by a Federal Court upon a mere balance of possible injuries, p. 255.

Injunction — Prospective outcome of proceedings.

2. To warrant interference with an order of a State Commission by a Federal Court, it must appear that there is a reasonable probability that the utility will prevail upon final hearing, p. 255.

Appeal and review — Presumption in favor of Commission.

3. An estimate prepared by company experts and officers on the value of its property should not be permitted to disturb a valuation fixed by State Commissions made after a hearing on the same cause unless the court is satisfied that the Commission's estimate is based upon some fundamental error of fact or of law, p. 256.

Return — Reasonableness — Factors to be considered.

4. The reasonableness of a rate of return is primarily a question of fact depending upon particular circumstances and situations as well as the current rate of interest, p. 257.

Injunction — Conflicting evidence.

5. The presence of material questions too doubtful for judgment to P.U.R.192SE.

be passed upon them at injunction proceedings because of conflicting evidence was held to necessitate the denial of an injunction restraining a State Commission from enforcing a rate order in view of the fact that the alleged loss of revenues would be so small as to be uncollectible, p. 258.

Injunction — Possibility of loss.

6. The possibility of loss of a relatively small amount is not of itself sufficient reason for a temporary injunction interfering with a state action in a state field, p. 258.

[April 11, 1928.]

APPLICATION by an electric company in a Federal District Court for a temporary injunction restraining the enforcement of a rate order of the Massachusetts Public Utilities Department; injunction refused. Case referred to Special Master with directions.

Appearances: Robert G. Dodge, of Boston, for plaintiff; Arthur K. Reading, Attorney General, and Sherman L. Whipple and Lothrop Withington, both of Boston, for defendants.

Before Bingham, Circuit Judge, Morton, and Morris, District Judges.

Morton, District Judge. This is an application for an injunction *pendente lite*, to restrain the Public Utilities Department of Massachusetts from enforcing an order requiring the plaintiff to make material reductions in its rate for domestic and commercial lighting. The record before us consists of the pleadings and ex parte affidavits filed by both sides and exhibits therein referred to. The principles upon which such injunctions are granted or refused are well established. "It is well settled that the granting of a temporary injunction, pending final hearing, is within the sound discretion of the trial court." Sanford, J. in Prendergast v. New York Teleph. Co. 262 U. S. 43, 50, 67 L. ed. 853, P.U.R.1923C, 719, 725, 43 Sup. Ct. Rep. 466. "The rates fixed by the Commission are presumed to be just and reasonable. The burden is upon the plaintiff to show that they are unjust, unreasonable, or confiscatory." Bryan, J. in Cumberland Teleph. & Teleg. Co. v. Louisiana Pub. Service Commission (D. C.) 283 Fed. 215, 217, 219, P.U.R.1923A, 594, 597 (statutory court). See, too, Louisiana R. Commission v. Cumberland P.U.R.1928E.

land Teleph. & Teleg. Co. 212 U. S. 414, 421, 53 L. ed. 577, 29 Sup. Ct. Rep. 357. "It is elementary that the jurisdiction now invoked is not to be exercised except 'in a case reasonably free from doubt,' and 'when necessary to prevent great and irreparable injury.'" Massachusetts State Grange v. Benton (D. C.) 10 F. (2d) 515 (Massachusetts statutory court), quoting Cavanaugh v. Looney, 248 U. S. 453, 456, 63 L. ed. 354, 39 Sup. Ct. Rep. 142.

[1, 2] The decisions relied on by the plaintiff conform to these rules. In the Ohio Bell Telephone Case (D. C.) 3 F. (2d) 701, it was found by the court that the valuation of the Commission was "probably too low;" and in the Monroe Gaslight & Fuel Company Case (D. C.) 292 Fed. 139, P.U.R.1923E, 661, 668, it was said: "These decisions require that a preliminary injunction should issue, if there is *reasonable probability* [italics ours] that the utility will prevail upon a final hearing," etc. Cases in which there has been a full hearing before a master stand, of course, upon a very different footing from the present application. The considerations mentioned by Judge Colt in Carpenter v. Knollwood Cemetery (C. C.) 188 Fed. 856, as governing the issue of injunctions *pendente lite*, refer to cases between private individuals. Where the acts of a state are drawn into question, somewhat different principles apply, as the foregoing quotations show. Governmental acts within the general power of the state are presumptively valid, and ought not to be interfered with by a Federal Court upon a mere balance of possible injuries. To warrant interference, it must appear that there is a reasonable probability that the utility will prevail upon final hearing.

The question is whether the plaintiff makes out a case within these requirements. The order which is attacked reduced its rate on domestic and commercial lighting from 8 cents to 5½ cents per kilowatt hour. There is no contention that the new rate will not produce income enough to pay all operating expenses; but the plaintiff does contend that it will not furnish an adequate return on the invested capital. In support of this contention it has filed the affidavit of Edward J. Cheney, apparently a competent expert on such matters, valuing its property for rate-making purposes at about \$8,000,000, and stating that the new rate will not P.U.R.1928E.

yield a return of over 4.83 per cent on this amount. There are other affidavits to the same effect, and to the point that such a rate of return will be inadequate and confiscatory; the company contending that the rate to be adequate must return at least 8 per cent on the value of the invested property. Mr. Cheney and some of the other affiants testified before the Department in the rate proceeding.

The facts relied upon by the state authorities are found in the decision of the Public Utilities Department, in P.U.R.1928C, 24, 26, in the returns made from time to time by the plaintiff company, in certain exhibits introduced by the plaintiff company in the rate proceedings before the Department, and in certain affidavits. The Department in its decision finds "that the fair value (of the) property for rate-making purposes, . . . based upon the principles enunciated by the Supreme Court of the United States in *McCardle v. Indianapolis Water Co.* 272 U. S. 400, 71 L. ed. 154, P.U.R.1927A, 15, 47 Sup. Ct. Rep. 144, and in other recent decisions of that Court, does not exceed \$5,500,000, and that the fair value of that portion of its property devoted to its domestic and commercial business, based upon these same principles, does not exceed \$2,500,000," that under the new rate the company's earnings, allowing nothing for increase of business caused by the reduction in price, will be more than sufficient to pay 6 per cent on the valuation stated, and that such a return is "very attractive" in Massachusetts for securities of this sort. The Department was also of the opinion that the company had, for the purpose of defending its high rate, allocated to its domestic and commercial lighting an undue proportion of its capital invested, and that, making proper adjustments for this, the new rate gave a return of much more than 6 per cent on the capital used in that part of the business. The decision of the Department appears on its face to have dealt with the questions presented fairly and intelligently.

[3] The parties are thus in disagreement as to the value of the property, the legal rate of return, and the amount of net return which the new rate will produce. Upon the first point we are asked to accept for present purposes the valuation of the company's expert and officers, against that of the Department made P.U.R.1928E.

after hearing the same expert and presumably the same officers. Under the principles above stated, this ought not to be done unless we are satisfied that the Department valuation, which carries a presumption of correctness, is based upon some fundamental error of fact or of law. The plaintiff contends that the Department has proceeded upon the Massachusetts theory of valuation in disregard of the principles established by the United States Supreme Court. In the case of Worcester Electric Light Co. v. Attwill, the Court evidently so viewed the findings of the Department, and the injunction was granted. 23 F. (2d) 891, P.U.R.1927E, 796. In the present case, which was decided by the Department after the Worcester Case had been decided by the Court, the Department explicitly states that its valuation has been arrived at under the rules of the United States Supreme Court. There is nothing in the record which warrants us in ignoring or disregarding this statement. The value found is a fact, in determining which the Department declined to accept the evidence of value now submitted to us by the plaintiff. We are not dealing with the case on full proofs, but only in a preliminary way and on the evidence as it stands. No sufficient reason is shown for rejecting the decision of the Department, which, as above stated, is presumptively correct, in favor of affidavits submitted by the plaintiff, largely from the same witnesses whose testimony *in extenso* was regarded as unconvincing by the Commissioners.

[4] As to the rate of return: On this point also the Department had before it, as we understand, substantially the same evidence as is before us, viz., that the rate of return should be 8 per cent. This evidence was rejected, and the Department adopted, as stated in its decision, a rate of 6 per cent. This also is primarily a question of fact depending upon a number of factors. What would be a fair return for a company in one locality at a certain period might be inadequate or excessive for other companies differently situated. The rate of interest has also to be taken into consideration. Bluefield Water Works & Improv. Co. v. Public Service Commission, 262 U. S. 679, 693, 67 L. ed. 1176, P.U.R.1923D, 11, 43 Sup. Ct. Rep. 675. On the plaintiff's own figures, it will get a return under the new rate of about 5 per cent on its valuation. On the figures of the Department its P.U.R.1928E.

return will be about 7 per cent. We are not at present satisfied that a return of less than 8 per cent would *ipso facto* be confiscatory, or that the return which the plaintiff will actually obtain under the new rate will be of that character. These points should await final hearing and possibly the results of actual experience.

[5, 6] The parties are in further disagreement, as above noticed, as to the correct allocation of capital invested between the different kinds of service furnished by the plaintiff, as to allowable expenses of operation, and perhaps on other matters. It may be that parts of the schedule should be revised upward, or possibly that the company should be somewhat differently capitalized. These are material questions, much too doubtful for any judgment to be passed upon them at this time. If it shall eventually be established that the new rates are so inadequate as to be confiscatory, the company will have lost such part of the difference, relatively small, as proves to be uncollectible, unless an injunction be presently granted. But this difference is not vital; and the possibility of the loss of it is, as the authorities above referred to show, not of itself sufficient reason for a temporary injunction interfering with state action in a state field.

It follows that the restraining order must be vacated and an injunction *pendente lite* refused. The case must be referred to a Special Master, with instructions to expedite the hearings.

Note.—Injunction.

- I. *In general*, 258.
- II. *What may be enjoined*, 259.

I. In general.

The Commission has no jurisdiction to grant an application for authority to increase fares on a railway incorporated under the Steam Railroad Act if there is in existence an injunction permanently enjoining the attorney general and the members of the Commission from enforcing the provisions of Chap. 92 of the Session Laws of Nebraska for the year 1907, and §§ 6067-6071, inclusive, of the Revised Statutes for the year 1913, and from instituting or prosecuting any suit or action against the railway for failure to continue in force any of the fares in effect. *Re Omaha & Lincoln R. & Light Co.* Application No. 6001, Oct. 6, 1925.

A temporary injunction restraining a city from interfering with P.U.R.1928E.

motor bus operation under a city ordinance was held to be too broad when a certificate of convenience and necessity had not been granted, and should be limited to restraining the mayor from signing a resolution rescinding the ordinance, and the city from doing any act it would be prevented from doing by reason of the privilege granted by the ordinance. *Colonial Motor Coach Corp. v. Oswego*, 126 Misc. 829, 215 N. Y. Supp. 159, April 2, 1926.

An injunction against the illegal operation of motor busses in competition with a street railway company in violation of a city ordinance should not be denied on the ground that the street railway company operated for some months prior to the enactment of the order in violation of the then existing ordinance. *People's Transit Co. v. Henshaw*, No. 7529 (C. C. A.) 20 F. (2d) 87, April 18, 1927.

II. What may be enjoined.

A city having legally terminated the franchise of an electric company may be granted an injunction to restrain the further distribution of electrical energy in the city and to require the removal of the distribution system from the city. *Acme Fertilizer Co. v. State*, 34 Ind. App. 346, 72 N. E. 1031, 107 Am. St. Rep. 190, 247; *Note to Butler v. Frontier Teleph. Co.* 186 N. Y. 486, 79 N. E. 716, 116 Am. St. Rep. 563, 585; *Bangor v. Bay City Traction & Electric Co.* 147 Mich. 165, 110 N. W. 490, 118 Am. St. Rep. 546. *Sac City v. Iowa Light, Heat & P. Co.* No. 38467, — Iowa —, 214 N. W. 571, July 1, 1927.

Injunction will not lie to restrain the Commission from interfering with alleged legal motor bus operation until there is a business actually in operation. *Washington Motor Coach Co. v. West* (Md. Cir. Ct.) Sept. 2, 1926.

Consumers have the remedy of injunction against a water utility which seeks to charge unreasonable rates. *Mamaroneck v. New York Interurban Water Co.* 126 Misc. 382, 212 N. Y. Supp. 639, Aug. 6, 1925.

An automobile operator for hire, in protesting against the legality of a Commission order requiring him to furnish indemnity security for his patrons, as well as certain equipment, may properly bring suit for injunction in equity, when he is denied a license by reason of such order, since he is without remedy in the law courts. *Bell v. Harlan*, No. 4514 (C. C. A.) 20 F. (2d) 271, May 26, 1927.

Dealers in gasoline are in position to invoke relief from a court of equity when a statute alleged to be invalid, makes sales of gasoline without a permit from a designated state officer unlawful and punishable as a misdemeanor, so that a continuation of such business would result in oppressive prosecution, even though no price has yet been fixed at which they must sell gasoline. *Standard Oil Co. v. Hall*, Nos. 304-306, 308, 24 F. (2d) 455, Aug. 20, 1927.
P.U.R.1928E.

MISSOURI PUBLIC SERVICE COMMISSION.**ROGERS IRON WORKS COMPANY, INCORPORATED***v.***JOPLIN WATER WORKS COMPANY.**

[Case No. 5,557.]

Service — Duty to serve — Supplying competing utility.

1. An iron foundry, supplying itself and other consumers nearby with water from its own well, is not part of the "public" as far as concerns its right to insist upon connection with a utility's main for alleged fire protection where the supply may be used as "stand-by" service by the foundry to fulfill its contract with its own consumers, in view of its status as a competitor to the utility, p. 263.

Service — Duty to serve competitor — Fire protection.

2. An iron foundry supplying itself and other consumers nearby with water from its own well is entitled to a meter connection from a utility's main only for the purpose of fire fighting since it has only the right of one public service corporation against another, p. 263.

[July 31, 1928.]

COMPLAINT of iron foundry against a water works for refusal to extend service; complaint dismissed.

Porter, Commissioner: This case is before the Commission upon complaint filed by the Rogers Iron Works, Inc., hereinafter called the complainant, against the Joplin Water Works Company, of Joplin, Missouri, hereinafter called the defendant. A public hearing was held at Joplin, Missouri, on the 10th and 11th days of January, 1928. At this hearing the complainant was represented by Mr. A. W. Thurman of Joplin, Missouri, and the defendant by Mr. C. H. Dickey of New York, New York, and by Grayston & Grayston of Joplin, Missouri.

This action was originally filed by the United Iron Works, Inc. It was agreed at the hearing that since the filing of the proceedings before the Commission, the United Iron Works, Inc., had sold the real estate, buildings, shops, property, and business to the Rogers Iron Works, Inc., and that the Rogers Iron Works, Inc., would be substituted as complainant. The facts as set out in the complaint and in the answer are undisputed and a brief statement will give the issue in this case.

P.U.R.1928E.

Prior to 1900, Mr. John W. Freeman established the company which was known as the Freeman Foundry Company. The business of the company was the manufacturing of pumps, hoists, and general mining machinery. The plant occupies a block in Joplin, Missouri, bounded by Joplin street, West 14th street and Wall street. The plant is a brick structure with no second floor except on the southeast corner where the complainant has its offices. The roof is supported by wood joists which are supported by iron pillars and wood all the way through. There are two large cupolas where they pour out the molten metal which runs into forms for castings. There is always intense heat at these cupolas. The company has three fire hydrants. On the premises there is a well about 1,000 feet deep; drilled by Mr. Freeman and equipped with a Pomona deep well pump. Water is pumped from this well to a standpipe which holds about seventy-six thousand gallons of water. Water is used for sprinkling the floors, putting out fires around the cupolas, and other general purposes. Except when the pump is out of order, the supply of water is usually adequate.

The evidence shows that many years back there was installed a connection with the mains of the defendant which lead through a 2-inch meter to the water works system of the complainant. In September, 1927, the defendant disconnected the 2-inch meter and installed in its stead a $\frac{5}{8}$ -inch meter, which the complainant asserts is always inadequate and does not give sufficient service, either for the protection of the plant or of the property, or of the safety of its employees. The complainant employs about one hundred men and sometimes two hundred. There have been fires in the building and water was used to extinguish them.

Mr. Freeman sold the plant and its business about 1906 to the United Iron Works, Inc., a Missouri corporation, which later transferred same to the United Iron Works, Inc., a corporation organized under the laws of the state of Delaware. As stated above, this property was subsequently transferred to the Rogers Iron Works Company, Inc. Mr. Freeman continued as a large stockholder in the United Iron Works, Inc., for many years, but at present has no interest in the complainant. At the time that he hold the plant, he was not only furnishing water to P.U.R.1928E.

the foundry itself, from the deep well aforementioned, but also to fourteen or fifteen buildings owned by him and to the round-house and yards of the St. Louis-San Francisco Railway Company, which is located nearby. Said dwellings, roundhouse, and yards are still served through mains located over or along the streets of Joplin. The water is measured by meters installed on the ground of the complainant and is paid for by meter measurement. The water to the dwellings is furnished as part of the service rendered for the rental paid and there are now twelve houses so served. Some of the houses have been sold by Mr. Freeman and have been disconnected from his mains. Said houses are now served from the mains of the defendant, said mains being in the streets in front of all of the dwellings. The defendant also has mains in the streets near the Frisco round-house. There was no evidence as to the amount of water used by the dwellings but the evidence shows that the complainant used about 30,000 gallons per day and delivered to the Frisco about 80,000 gallons.

Officers of the defendant testified that in seeking for new business they looked into the arrangements between the complainant and the St. Louis-San Francisco Railway Company, which is the second largest user of water in the city of Joplin, and found that the contract would expire in 1927. They opened negotiations with the Frisco and at one time were informed that the Frisco would, at the termination of the contract, take water from the defendant. They were later instructed, however, that the complainant had reduced the rates below those in force by the defendant and that the Frisco would continue to take water from the complainant.

The testimony shows that the complainant's supply of water was adequate except when the pump broke down and that at these times the complainant would turn water from the mains of the defendant into its standpipe in order to deliver the water that it had contracted for to the Frisco. Exhibits were filed to show that with the exception of a few months, the complainant paid only a minimum charge for a 2-inch meter. The testimony also showed that the complainant was never in arrears for the payment of its water bills.

P.U.R.1928E.

The complainant contends that under the Public Service Commission Law and the rules of the company it is entitled to a 2-inch connection for the purpose of protecting its plant against fire hazards and for other purposes. The complainant further contends that due to congested streets and the lack of entrance, the fire department is unable to render prompt service and that it is necessary to put out the fire that blazes up around the cupolas with its own water supply. Defendant placed on the witness stand the chief of the Joplin fire department, who stated that from the time of turning in a call the fire engine from one station would reach the plant site in two minutes and from another station in about one minute. The defendant stated that they were willing to install a fire service which would be connected solely to fire fighting equipment. The defendant further stated that it would not furnish water to the complainant for the purpose of protecting defendant in its sale of water to the Frisco and the dwelling houses when it was plain that such sales were in the defendant company's franchise territory and in direct competition with the defendant company.

Conclusions.

[1, 2] The issue in this case is plain. Should the defendant company be forced to furnish water to complainant when the complainant in turn sells said water to parties not situated on the grounds of complainant nor connected in any way with complainant's business? In other words, may complainant claim the right as a member of the consuming public to demand a connection with the mains of the defendant and thereby use said defendant's plant as a stand-by plant to protect it in the sale of water to consumers lying within the franchise territory of the defendant? The Commission is of the opinion that the contrary is established.

"One water company, or one telephone company, or one telegraph company, or one street railway company, or one railroad company while bound appropriately to serve the general public, cannot, unless under express statutory enactment, and by due process of law thereunder, be compelled to give its property to the uses and benefits of a rival except by some form of condemnation. The rival is not, ordinarily, to be included in the P.U.R.1928E.

term 'general public.' " *Evansville & H. Traction v. Henderson Bridge Co.* 134 Fed. 973.

The Commission will not pass upon the facts as to whether the complainant in this case is a public utility within the definition of the Public Service Commission Law. However, the assumption of a public function, and in supplying water to outside consumers, the complainant herein became a competitor of the defendant, and has only the rights of such competitor in making its demands. *People ex rel. New York Edison Co. v. Public Service Commission*, 191 App. Div. 237, P.U.R. 1920C, 526, 181 N. Y. Supp. 259; *id.* 230 N. Y. 574, 130 N. E. 899. The defendant has offered upon proper application, to install a connection for the purposes of fire-fighting only. This is all that the complainant herein is in equity and fair-dealing entitled to. The complainant has not the right of the public to demand service upon payment of the legal rates, but it has only the rights that one public service corporation has as against another, and these do not include the right to demand service of a competing company for the purpose of enabling the petitioner to undersell that competing company and to take away its customers. *People ex rel. New York Edison Co. v. Public Service Commission*, *supra*.

In view of the above, the complaint herein will be dismissed.

Brown, Chairman, Calfee and Hutchison, Commissioners, concur; Ing, Commissioner, absent.

NEW JERSEY BOARD OF PUBLIC UTILITY COMMISSIONERS.

RE PUBLIC SERVICE COORDINATED TRANSPORT.

Service — Commission jurisdiction — Street railway terminals.

1. The law does not authorize the Board to order the installation of additional equipment or facilities by utilities such as the maintenance of a waiting room at a terminal unless the business and revenues incident thereto justify the expenditure for such purpose, p. 265.

Commissions — Jurisdiction to abate nuisance — Sidewalk congestion.

2. A Commission has no jurisdiction to eliminate undue congestion
P.U.R.1928E.

on the sidewalk in front of business houses caused by the congregating of prospective patrons waiting at the terminal of a street railway because of the failure of the utility to provide a waiting room, p. 265.

[July 30, 1928.]

COMPLAINT against the failure of a street railway company to provide a waiting room at a terminal; dismissed for lack of jurisdiction.

Appearances: Francis Purcell for Purcell Brothers, complainants; C. S. Straw for the Public Service Coordinated Transport.

By the Board: This matter comes on by reason of a complaint made by Katherine Lane Holloway and by Purcell Brothers, located on the east side of Warren street near State street, Trenton, New Jersey, to the effect that passengers waiting for cars of the Public Service Coordinated Transport having a terminal on Warren street at State street, congregate in the doorway of complainant's store, particularly during inclement weather, to such an extent as to seriously interfere with their business, and no suitable shelter is afforded in inclement weather.

It appears from the evidence that for a number of years previous to November, 1927, the Public Service Railway Company, now Public Service Coordinated Transport, maintained a waiting room in the same building now occupied by the complainants for the accommodation of the patrons of the Riverside and Fast Lines terminating on Warren street immediately south of State street, in the city of Trenton. The company did not own the building but rented the first floor for waiting room purposes and sublet a portion thereof to a subtenant, who utilized the same for a confectionery and news stand. Owing to the falling off in traffic on the Riverside and Fast Lines, proportionately fewer persons utilized the waiting room. The subtenant finally gave up business and vacated the premises.

[1-2] The Board would have jurisdiction upon complaint of patrons to require suitable waiting room facilities to be provided if evidence to that effect indicated that it was necessary under the provisions of the statute requiring public utility companies to furnish safe, adequate, and proper service. Mr. Purcell
P.U.R.1928E.

stated that his interest in providing a waiting room was so that the sidewalk congestion may be eliminated in front of Purcell Brothers store. Mrs. Holloway did not attend in time for the hearing, but by letter advises the Board of the inconvenience of waiting for trolleys in inclement weather. The proofs before the Board show that the traffic has fallen off considerably in the past few years and the circumstances do not justify the maintenance of the waiting room from the standpoint of the service rendered by the utility. The law does not authorize the Board to order the installation of additional equipment or facilities unless the business and revenues incident thereto justify the expenditure for such purpose. The question of eliminating undue congestion on the sidewalk in front of the complainant's premises is not one within the Board's jurisdiction but is rather a police regulation.

The Board finds and determines, therefore, that traffic conditions at the terminal of the Riverside and Fast Lines of the Public Service Coordinated Transport on Warren street, in the city of Trenton, do not justify the expense involved in the establishment and maintenance of a waiting room. The complaint, therefore, is dismissed.

MISSOURI PUBLIC SERVICE COMMISSION.

THOMAS C. BOYD

v.

UNION ELECTRIC LIGHT & POWER COMPANY.

[Case No. 5,710.]

Service — Discontinuance — Wiring irregularity not in bad faith.

An irregularity in domestic wiring previously used for a home generating plant and connected to utility service upon approval of the latter's inspector was held to be too obvious to have been installed in bad faith in view of the usual arrangement of such wiring in connection with the replaced system, and service discontinued upon its discovery was ordered to be resumed after correction of the irregularity and approximate compensation for the energy unknowingly diverted.

[July 28, 1928.]

P.U.R.1928E.

COMPLAINT by an electric consumer against a utility for failure to render service; service ordered to be resumed upon certain conditions.

By the Commission: This case is before the Commission upon the complaint of Thomas C. Boyd, who resides at 3219 Woodson Road, Overland, St. Louis county, Missouri, and hereinafter referred to as the complainant. The complaint was filed with the Commission on February 9, 1928, after which a hearing was held in St. Louis and the matter was submitted on the record.

The defendant is the Union Electric Light & Power Company of St. Louis, Missouri, with one of its branch offices located in Webster Groves in St. Louis county, and furnishes electric light and power service throughout the city of St. Louis and St. Louis county, Missouri.

The complainant states that he is the owner of and with his family resides at the aforesaid address of No. 3219 Woodson road and acquired that property on or about the 8th day of March, 1924, and took possession of the same on the 15th day of the same month.

The complainant states that at the time of moving into the property there was no electric meter installed in the residence, the electric service theretofore having been furnished by a Deleo system. He states that he made application to the defendant company for electric service from its system and that about three weeks later the defendant installed a meter and began delivering electric service. The Deleo system which was used for the furnishing of service to this property prior to the complainant's occupancy was moved away by the party who had previously resided there. The complainant also states that the electric wires which were in the residence at the time he purchased it were used and are now used for the furnishing of electric service, the meter being connected to the house wiring that was formerly used in connection with the Delco system.

The complainant further states that on or about the 1st of April, 1927, an inspector of the defendant company called at the residence of the complainant and after making inspection of P.U.R.1928E.

the premises informed complainant that there was an irregularity in the wiring of said premises. The defendant company states that the inspection was made on the 14th of April. Following that inspection service was discontinued to the premises on the 18th day of the same month.

The defendant states in its answer to the complaint that upon receipt of information of an irregular connection of complainant to its lines and after due and lawful notice to complainant, service was disconnected in order to avoid the granting of a privilege or facility to complainant contrary to those extended to all persons and corporations under like circumstances, and that the complainant has not any time offered to comply with uniform and regular regulations applicable to all persons and corporations under like circumstances, all of which said regulations have been made known to the complainant.

It appears from the evidence that the premises which the complainant now owns and occupies as a residence was wired by a former resident for use in connection with a local Delco generating plant, and for that reason no meter was installed for the measuring of current consumed. Upon the transfer of the property the former occupant removed the Delco generating system but left the house wiring unchanged. The complainant then made application to the defendant company for electric service and by defendant's Exhibit No. 3 it is shown that an electric inspection was made of the premises on April 5, 1924.

The complainant took possession of the property, as stated above, March 15, 1924, and claims that after making application for electric service, about three weeks later a meter was installed and service rendered from then on until the 18th day of April, 1927. On the 14th of April, 1927, an inspector of the defendant company called at the premises of the complainant and after making an inspection of the wiring, reported irregularities in the house wiring.

The complainant claims to have known nothing about the irregularity, claiming that he did not know enough about the art of electricity to know whether or not there was an irregularity.

The evidence shows the irregularity to be an arrangement by which a part of the electricity used on the premises did not pass P.U.R.1928E.

through the electric meter. The service wires from the defendant lines came to an entrance switch installed in complainant's kitchen; between the entrance switch and the meter were installed the usual connecting wires. There were also connected to the entrance switch at the same points the connecting wires; to the meter were connected two wires which lead through the kitchen wall of the residence to the outside and to the complainant's garage. Over these wires electric lighting service was being furnished to the garage. There were also connected to the connecting wires between the entrance switch and the meter two wires which lead to the complainant's basement, serving four basement lights, and then up to a floor plug in the complainant's front room. The defendant's inspector claims that at the time of the inspection of the premises the amount of current being taken at that time indicated that service was being supplied to a load such as would be required to operate a heater from the floor plug in the front room.

The complainant does not attempt to deny the conditions of the wiring as shown by defendant's Exhibit No. 2, filed at the hearing of this case, but denies any knowledge of an irregularity in the wiring, stating that he had made no change in the wiring of the premises since the meter was installed. The electric heater which was connected to receive current without passing through the meter was obtained from the complainant's wife's sister and had been in his possession about five weeks prior to the inspection by the defendant company. Since the disconnection of the defendant's electric lines, the complainant has depended upon kerosene lamps and gas for illuminating purposes in his residence.

The question before the Commission for determination is whether or not the complainant has been guilty of an act that would justify the defendant company to refuse to furnish electric service to the complainant's premises.

It is evident that there has been irregularity in the wiring but the complainant claims to have had no knowledge of the irregularity, and it appears that if there had been an attempt on the part of the complainant to secure current without this proper registration on the meter that a much less conspicuous arrangement would have been possible.

ment would have been made for that purpose. From the exhibits shown in this case it is difficult to understand how anyone versed sufficiently in the methods of installing electric wires to divert current from passing through the meter could have expected the defendant's meter reader and inspector to pass up the connections as they were made in this instance. It is difficult for the Commission to determine how this arrangement came about.

Such an arrangement of wires is easily understood when used in connection with a Deleco system but it is difficult to understand how the electric inspector passed up such a connection unless he assumed that the three circuits leading from the entrance switch would be joined to the load side of the meter by proper connecting wires and the line side of the meter connected to the entrance switch as would be required for proper connection. His inspection appears to have been prior to the installation of the meter and it is possible that the point of junction of the meter was not indicated at the time of the inspection. If such conditions were true, it was the duty of the man who installed the meter to have recognized the condition of the wiring, if it were as shown by the exhibits filed in this case.

If the complainant had such knowledge, as we have discussed before, to install the wires as shown in this complaint, he should have expected the first meter reader to notice such irregularities. Our conclusions are that there has been no fraud and that the irregularity has come about from inadvertence, and that the service should be restored immediately after proper changes in the complainant's wiring by the defendant company.

The evidence shows that the defendant company has offered to restore the service upon the payment of 10 dollars by the complainant, the original bill in this case for service which the defendant company claims to have furnished without the passage through the meter to have amounted to \$161.99, an estimated amount.

If the irregularities in the wiring have continued since the defendant's meter was first installed, it is evident that the complainant obtained service for which he has not paid, and we do not believe that the paying of ten dollars (\$10) is an unreasonable amount.

P.U.R.1928E.

able charge for that service. This charge should be spread over a period of time and paid in amounts similar to the amounts that might have been paid had the current passed through the meter, and for that reason the Commission is of the opinion that it should be added to the complainant's bill in the amount of \$1 per month for ten months. The complainant will be required to remove all irregularities in the wiring of his premises before the defendant shall be required to make the necessary installations for the restoration of service.

Brown, Chairman, Ing, Calfee and Porter, Commissioners,
concur; Hutchison, Commissioner, absent.

INDIANA PUBLIC SERVICE COMMISSION.

RE ARGOS TELEPHONE COMPANY.

[No. 9377.]

Service — Telephones — Excessive use of line.

1. A complaint by telephone patrons that a utility permitted certain subscribers to hold country lines longer than five minutes was held not to indicate insufficient service where the alleged inconvenience arose through the fault of the patrons themselves, p. 273.

Service — Telephones — Record of unanswered calls.

2. A complaint by telephone subscribers that the utility operators did not keep a record of unanswered calls was held not to reflect an insufficiency of service because of the manifest impossibility of the proposed suggestion, p. 273.

Service — Telephones — Diligent operation.

3. A complaint by telephone subscribers that operators were not diligent in attempting to procure answers on calls was held to be more or less unreasonable where it was shown that two operators handled approximately three thousand calls a day, and where the service in the main was shown to be constantly improving, p. 273.

Return — Percentage allowed — Telephones.

4. An increase of rates calculated to yield a return of approximately 7 per cent on the fair value of telephone properties was allowed, p. 274.

[July 13, 1928.]

APPLICATION of telephone company for increased rates for service; rates adjusted.

P.U.R.1928E.

Appearances: Franklin W. Morgan, Roscoe D. Pontius, for petitioner; J. O. Harrold, Mr. White, Mr. Hessong, Dr. James Grummer, Mr. Vorhis, for objectors.

Harmon, Commissioner: On the 19th day of May, 1928, the petitioner filed its petition herein, in words and figures following, to-wit:

"The petition of the above named Argos Telephone Company respectfully represents and shows:

(1) That it is a corporation, organized and doing business under the laws of the state of Indiana.

(2) That its principal place of business is in Argos, Indiana, and that it is a public utility engaged in the management and operation of a telephone plant in said town of Argos, Indiana, and surrounding rural territory mostly in Marshall county, Indiana, and that as such public utility it is subject to the provisions of the laws of the state of Indiana.

(3) That under the provisions of the laws of Indiana it is unlawful for any public utility doing business within the state of Indiana to demand, receive, or collect a greater compensation for any service than the charge fixed for it.

(4) That on the 1st day of May, 1928, it had in effect the following schedule of rental rates, installation, and service connection charges:

<i>Town.</i>	<i>Gross.</i>	<i>Net.</i>
Single party business	\$1.65	\$1.50
Party line business	1.40	1.25
Single party residence	1.50	1.35
Party line residence	1.30	1.15
<i>Rural.</i>		
Single party residence	\$1.65	\$1.50
Party line residence, grounded	1.35	1.20
Party line residence, metallic	1.50	1.35
Party line business	1.50	1.35
Extension telephone .....	.50	.50
Extension bell .....	.25	.25
<i>Service Connection Charges.</i>		
Installing telephone, extension telephone or extension bell	\$3.50	
Moving telephone from one building to another	3.50	
Moving telephone within same building	3.00	
Changing type of telephone	3.00	
Taking over a telephone already in .....	.50	

(5) That it asks this Commission for authority to readjust
P.U.R.1928E.

its schedules of rates for the reason that its present rates are insufficient to meet the increased expenses, provide a necessary depreciation fund and pay a reasonable return on the capital invested. Taxes have increased from approximately nine hundred dollars paid in 1927 to \$1,500 to be paid in 1928. Our wage scale has necessarily been kept so low because of the lack of income, that we have paid much below the average wages. The company has been incorporated since January 1 of this year and securities in the form of bonds in an amount of \$20,000 have been sold, bearing interest at the rate of $5\frac{1}{2}$ per cent annually or \$1,100 per year. These principal items of increased expense in addition to several minor ones make it imperative that our income be increased through additional revenues; that the company in a schedule hereto attached and made a part of this petition, sets forth therein a full and readjusted schedule which the company believes would be equitable and fair to the company's patrons and to the company itself and enable it to secure returns sufficient to meet its present requirements.

Wherefore, the company prays that after due hearing and investigation, the Public Service Commission make an order granting the application herein and establishing the proposed rates or such rates as it may find equitable in the premises."

The said cause was set for hearing in the Town Hall at Argos, Indiana, at 11 o'clock A. M. on Thursday, July 5, 1928, and due and legal notice by publication and otherwise was given to all interested parties of the time and place of such hearing.

At the hearing, which was attended by a number of patrons, certain verbal objections were stated but no written objections were filed of any kind. At said hearing it was shown that in a previous hearing in the year 1928, the value of the petitioning utility was fixed at \$54,708.56 and, there having been no material change since the date of said valuation, that sum is taken as the rate base in fixing the rates in this proceeding.

[1-3] The only objections stated by the objectors were: First, that the utility permitted certain patrons to hold country lines longer than five minutes, the time limit prescribed by the rules of the Argos Telephone Company; second, that the telephone operators in charge of the operation of said plant did P.U.R.1928E.

not keep a record of calls made where patrons were unable to answer 'phone rings promptly; third, that the telephone operators were not as diligent as they might have been in attempting to procure answers on calls made by them for patrons of the telephone company.

It was apparent to the Commissioner, and practically admitted by the persons making the complaint, that each of the so-called objections were operating questions and were not caused by any defect in the equipment of the utility or by any real inattention on the part of the management. It is apparent that the first objection is the fault, in a large degree, of the patrons themselves. The second one was a manifest impossibility. The third, considering the fact that it was shown that two operators handled approximately three thousand calls a day, indicated that the so-called objection was more or less unreasonable. In the main the service was shown to be good and improving constantly.

The plant has been changed until it is now 59 per cent metallic and changes are now in progress which will increase the efficiency of the plant materially.

[4] Taking \$54,708.56 as the rate base and figuring 7 per cent as a fair return thereon, there remains nothing to do under the law except to determine what rates will meet the requirements of the petitioner.

The following tabulation, compiled by the engineering department of the Public Service Commission, shows what those requirements are: [Tabulation omitted.]

The following rates will produce the requirements hereinbefore referred to, less \$304.90:

<i>Classification of Service.</i>	Rates per Month.	
	Net.	Gross.
Single line, business, town	\$2.25	\$2.50
Party line business, town	2.00	2.25
Single line residence, town	1.90	2.15
Party line residence, town	1.50	1.75
Single line residence, rural	2.25	2.50
Party line business, rural	2.00	2.25
Single line residence, rural	1.75	2.00
Party line residence, rural (grounded)	1.40	1.65
Party line residence, rural (metallic)	1.40	1.65
Extension telephone .....	.50	.75
Extension bells .....	.25	.50

Single line rates shall apply on all lines not longer than one-P.U.R.192SE.

half mile beyond the base rate area. Beyond that an additional charge of 50 cents per month for each mile, or fraction thereof, may be collected.

All of the above rates under the heading "net" shall be regarded as net rates for service. There may be added a collection charge of 25 cents on those bills only which are not paid on or before the 15th of the month in which such service is rendered; those are designated as "gross" rates.

In addition to the rates suggested, the company should be allowed to make the following charges: [Incidental rates omitted.]

Vacation Rate.

A vacation rate of 50 per cent of the regular net rate will be allowed for a period of not less than one month or more than four months.

In the petition filed, the utility asked that a different rate be fixed for grounded and metallic service. Following the hearing, this request was withdrawn and for that reason no change has been made in the rates charged for each.

At the hearing a request was also made that an additional charge be made for residence 'phones which were used for both residence and business purposes. This request is denied. Certain other changes have been made in the proposed schedule submitted by the utility.

Singleton, McIntosh, Commissioners, concur; McCardle, Ellis, Commissioners, concur in all parts of this order, except the rule fixing the mileage charge for individual line service beyond the base rate area.

P.U.R.1928E.

**NEW YORK DEPARTMENT OF PUBLIC SERVICE,
STATE DIVISION, PUBLIC SERVICE COMMISSION.**

**CHARLES CALE AND DANA SMITH, Doing Business as
Empire Oil Company**

v.

JAMESTOWN TELEPHONE CORPORATION.

[Case No. 4542.]

Service — Extension of telephones.

A telephone company was not required to invade the territory of a neighboring company in order to provide telephone service to a subscriber previously receiving its service at other premises, notwithstanding the fact that it was already serving other subscribers in that vicinity because of obligations assumed in the process of corporate consolidation.

[June 27, 1928.]

COMPLAINT by individual against refusal of telephone company to render service; denied.

Appearances: Grant E. Neil, for petitioners; John E. Durkin, for Jamestown Telephone Corporation; Frank Mott, for Ashville & Panama Telephone Company.

Pooley, Commissioner: The petitioners are copartners, engaged in business under the firm name and style of Empire Oil Company. They are dealers in coal, wood, oil, and gasoline, and their place of business is located at the hamlet of Ashville, near the right of way of the Erie Railroad. They say, and it is not disputed, that a large part of their business comes from the territory served by the Jamestown Telephone Corporation, to which they have applied for service and have been refused. The Jamestown Telephone Corporation alleges that it has no lines near the place of business of petitioners, that to serve them would require an extension of their lines of .7 miles at a cost which would make the revenue derived noncompensatory, and that the petitioners are within the territory served by the Ashville & Panama Telephone Company, by whom they are now served; that an extension of its lines such as would be required to serve the petitioners would be economically unsound, would result in ruinous competition with the Ashville & Panama Telephone Company, and a substantial loss of telephone subscribers of that company.

P.U.R.1928E.

The cost of such extension and the question of rates do not enter into this case, for the petitioners have indicated their willingness to reimburse the company for such cost, and if necessary, to pay toll rates. The Ashville & Panama Company opposes the application, claiming that the territory involved has been established exclusively as its territory, and it was shown on its behalf that it has been serving the territory since the year 1902; that it has 350 stations, maintains a toll service between the Jamestown Telephone Corporation and the Sherman Telephone Corporation and through toll lines from Mayville, Westfield, and Jamestown; that it operates practically a rural service and serves the village of Panama and the unincorporated villages of Ashville, Lockville and Watts Flats; that the number of business stations compared with residential is very small; that while its rates are very low it feels that they are as high as the traffic will stand; that it depends almost entirely upon its toll business to keep its plant in operation and render local service; that if the Jamestown Telephone Corporation is permitted to install telephones in its territory, it can not long exist.

The sole point involved in this case is as to whether the Jamestown Telephone Corporation should be directed to invade the territory of the Ashville & Panama Company and provide telephone service to subscribers of that company. It appears, the petitioners in 1922, established themselves in business at Cheney Point, on the west side of Chautauqua Lake, at least ten miles from the city of Jamestown, and there had Jamestown telephone service. Subsequently, they removed to Ashville, on the main line of the Erie Railroad, where, though much nearer to Jamestown, they have been unable to obtain Jamestown telephone service except through the Ashville & Panama Company. They claim that the Jamestown Company formerly served the territory in question and now has lines extending into it, and actually has subscribers in that territory. They call attention to the Jamestown Telephone company directory, showing numerous subscribers in the vicinity of Cheney Point and Stow, much farther from Jamestown than the location of the Empire Oil Company. It appears that there are several telephone subscribers of the Jamestown Company in the vicinity of Ashville and north P.U.R.1928E.

thereof. In Case No. 2214, Mr. Grant E. Neil, attorney for petitioners, residing in Ashville, applied for Jamestown telephone service, and after the service of the complaint upon the Jamestown Telephone Corporation, a telephone was installed, but the situation was somewhat different in that Mr. Neil had been a Jamestown Telephone Corporation subscriber, and no construction work was required to reinstall his service.

The Jamestown Telephone Corporation combines the competitive systems formerly operated by the New York Telephone Company and the Home Telephone Company of Jamestown. In the competitive period, prior to the organization of the Jamestown Telephone Corporation, extensions of telephone lines to outlying points were made probably beyond all reason. The Jamestown Telephone Corporation found itself saddled with various unremunerative lines, which it claimed greatly increased its rates. No curtailment of this service appears to have been attempted because perhaps of the reluctance of the company to deny service already enjoyed, nor did the city of Jamestown insist that such outside service should be cut off.

In view of all the circumstances, we are of the opinion that the lines and service of the Jamestown Telephone Corporation should not be extended further into outside territory, especially when such extension tends to reduce the revenues and consequently impair the service of a small company already serving the territory. It is said that a large part of the business of the petitioners is transacted with residents of Jamestown, and that Jamestown customers are unable to communicate with them by telephone because unaware of the situation or unwilling to pay the toll charges. It would seem that a reasonable arrangement should be made between the Jamestown Telephone Corporation and the Ashville & Panama Telephone Company whereby subscribers of the latter company situated as the petitioners seem to be, could be listed in the Jamestown Telephone Company's directory, and thereby have practically what amounts to Jamestown Telephone service.

The petition is therefore denied.

Chairman Prendergast and Commissioner Brewster concur;
Commissioners Van Namee and Lunn not present.
P.U.R.1928E.

ILLINOIS COMMERCE COMMISSION.**RE ILLINOIS BELL TELEPHONE COMPANY.****RE CITY OF URBANA et al.**

[Nos. 14389, 14390.]

Accounting — Operating income — Slack season — Telephone.

1. The falling off in revenue due to the vacation period at a university and a slight increase in operating expenses during the same period, owing to employees of the company being on vacations, were both taken into consideration by the Commission in arriving at the annual operating income of a telephone utility serving a university community, p. 283.

Depreciation — Aggregate allowance — Irregularities in bookkeeping.

2. The history of a utility's operation furnishing no reliable index to the cost of maintenance and depreciation of its property in current condition because of past irregularities in bookkeeping in which the distinction between depreciation, repairs and maintenance charges were not observed, it was held to be safer from the standpoint of all concerned that an allowance be made for the aggregate amount needed to insure the upkeep of the property and to provide against depreciation thereof, p. 286.

Depreciation — Distinguished from maintenance — Interstate Commerce Commission.

3. The State Commission deemed it inadvisable and unnecessary to make a division in fixing the rate of depreciation between depreciation and maintenance in view of the fact that the exact limitation and distinction of the two charges were not finally settled by the Interstate Commerce Commission and a decision thereon was still pending, p. 287.

Depreciation — Aggregate allowance — Repairs, maintenance, and depreciation — Telephone.

4. An aggregate allowance of 9 per cent of the investment in fixed capital of a telephone utility was submitted as an annual charge for repairs, maintenance, and depreciation, p. 287.

Return — Percentage allowance — Telephone.

5. Rates yielding a return of approximately 6.51 per cent of the depreciated cost of physical telephone property were permitted to continue in effect, p. 288.

[June 13, 1928.]

APPLICATION of a telephone company for increased rates for service; current rates ordered to be continued.

By the Commission: On August 1, 1924, the Illinois Bell Telephone Company filed with the Commission rate schedule P.U.R.1928E.

Ill. C. C. 1 in which, it was proposed that rates for telephone service be advanced and in which it was further proposed that such advance in rates become effective on October 1, 1924. On June 25, 1925, the Commission entered an order authorizing the petitioner herein to place the said schedule of rates in effect July 1, 1925. For reasons set forth in the order the Commission retained jurisdiction of the cause for the purpose of taking such further evidence and entering such further orders as conditions might warrant.

On July 15, 1925, a joint application for rehearing in the cause was filed by the city of Urbana, the city of Champaign, the chamber of commerce of the city of Champaign, the Association of Commerce of the city of Urbana, W. F. Burres and George J. Babb, subscribers for telephone service in the cities of Urbana and Champaign and accompanying the application was also a motion by the aforesaid interested parties urging that the cause be set for further hearing at the earliest possible date to the end that just and reasonable rates might be established by the Commission for telephone service in the said municipalities. Motion was also made that the Commission direct its engineering and accounting staff to make an appraisal of the property of the petitioner and to check the books and records of the company.

The case was set for hearing on October 7, 1925, at which time the request of the objector for a complete investigation was renewed. Criticism was also directed at valuations submitted by the company in the previous hearings inasmuch as the plant had been almost entirely rebuilt since the date of the last inventory and as a result of this criticism and the request on the part of the objectors for a present-day inventory of the property it was stipulated that a new inventory and appraisal of the property as it exists at the present time and up-to-date estimates of operating revenue and expense be prepared by the company and that the Commission through its engineering and accounting sections should prepare similar exhibits whereupon the case was continued to a date to be later determined.

On October 7, 1926, the case was set for further hearing at which time the exhibits prepared by the company and the Com-P.U.R.1928E.

mission's staff in accordance with the stipulation at the previous hearing were presented in evidence. Because of changes in plant and in operating methods between the time that the two sets of exhibits were compiled the valuation data and operating data offered at the previous hearings became practically obsolete and for this reason only the exhibits and testimony presented at the later hearings will be discussed by the Commission in this order.

The petitioner herein, the Illinois Bell Telephone Company, presented as evidence herein an inventory of the property as of December 1, 1925, and an appraisal of the said property using unit cost prices current as of that date. In summarizing the appraisal only the Champaign and Urbana exchange property was included and the toll portion of the central office equipment, although shown in the detailed inventory and appraisal by the application of the same unit prices was omitted from consideration in arriving at the valuation on which the company claims a rate of return. In its summary of the valuation wherein the company develops a fair value of the property, material and supplies, and working capital have been included and the company has also included an item "cost of establishing business" equal to 10 per cent of the reproduction cost new of the physical property.

The engineering staff made a detailed check of the inventory submitted by the company and found the same to have been accurately compiled and the accuracy of the same having been ascertained it was used as the basis of the original cost appraisal submitted by the engineering staff. The valuation prepared by the Commission's staff differs from the one presented by the company in that the toll portion of the central office equipment in the exchanges under consideration is included in the valuation of the property.

The evidence of record shows that from December 1, 1925, the date of the inventory, to August 31, 1926, some net additions have been made to the property of the petitioner and they have been included in the following tables summarizing the valuation evidence.

P.U.R.1928E.

TABLE I.
Champaign-Urbana.
Table Summarizing Evidence Regarding Valuation.

Company.			Commission's Engr. Staff.
	Reproduction Cost New.	Depreciated Cost.	Original Cost.
Physical property Dec. 1, 1925 (less toll central office equipment) ...	\$1,550,250	\$1,481,184	\$1,560,491
Cost of establishing business	150,344	150,344	
Total as of Dec. 1, 1925	\$1,700,594	\$1,631,528	
Net additions Dec. 1, 1925 to August 31, 1926	50,607	50,607	45,130
Total as of August 31, 1926, exclusive of toll equipment	\$1,751,201	\$1,682,135	\$1,605,621
Toll C. O. equipment	105,549	105,549	124,610
Total valuation as of Aug. 31, 1926	\$1,856,750	\$1,787,684	\$1,730,231

NOTE: No allowance for going value or cost of establishing business has been included in estimate of the Commission's engineering staff.

The company presented as evidence of record an estimate of operating revenue, expense, and net income as disclosed by the books and records of the said company, using as a basis for the said reports the operating expense and operating revenue of the company for the first six months of 1926 and the first eight months of 1926 respectively. The purpose of selecting this period of time on which to base the operating expense for the year was the fact that a large unit of automatic equipment was placed in service on or about August 1, 1925, and from that date until January 1, 1926, the expense due to the cut over from manual to automatic was in excess of normal but that by January 1, 1926, conditions had so adjusted themselves so that the expense from and after January 1, 1926, represents a true and accurate estimate of what the expense in the immediate future will be.

The accounting staff of the Commission presented as evidence of record a detailed audit of the books and records of the Illinois Bell Telephone Company, for the company as a whole, for the Illinois division, of which the property in question is a part, and for the Champaign-Urbana properties. The audit contains a detailed analysis of the plant accounts, from 1913 to August 31, 1926, additions to plant, plant retirements, analysis of the depreciation reserve, statistics regarding the number of subscribers.

P.U.R.1928E.

ers connected during this period and covers practically every phase of activities of the petitioner as disclosed by the books and records. In addition to the items enumerated hereinabove the report contains an analysis of the operating expense and revenue of the company by months for a period of several years prior to August 31, 1926. By analyzing the expense the statement of the petitioner is borne out that the expense of operation prior to January 1, 1926, is in excess of normal and an analysis of the expense by months during the period the new equipment has been in operation shows that the expense gradually decreased until January 1, 1926, and that since that date there has been but little variation. The accounting section has prepared and submitted a statement of operating expense, revenue, and income for the first six months of 1926 and for the first eight months of 1926 which are the same period covered by the evidence of the petitioner. Table II, shown herein gives a comparison of the items of revenue and expense as submitted by the petitioner and the Commission's accounting staff. [Table omitted.]

[1] In Table II, depreciation of plant and equipment and maintenance expense has been omitted from consideration and this compilation shows the amount available for current maintenance, depreciation, and return on investment. This figure calculated on the basis of the eight months' period is slightly lower than for the six months' period which seems to be accounted for due to the fact that during the months of July and August which are included in the eight months' but not in the six months' estimate there is a falling off in revenue due to the vacation period at the university, a slight increase in operating expense during the months of June, July, and August due to employees of the company being on vacations and these are factors that will be given consideration by the Commission in arriving at the present annual operating income.

Comparing the figures submitted by the company and by the Commission's accountants we find the only substantial difference in the operating revenue is in the item "toll revenue" for the six months' period. All other items of revenue shown in the two reports check reasonably close. The operating expense differs principally in the item "general and miscellaneous expense"

P.U.R.1928E.

which appears to be due to the method of dividing or distributing the general and miscellaneous expense between the several exchanges of the Illinois Bell Telephone Company. The company, it appears, previously allocated this expense on its books on the revenue basis and only recently changed the allocation of this item to an expense basis. In arriving at the figure set up by the company the division appears to have been made on the former basis while the latter basis was used by the accounting staff of the Commission in the exhibits submitted. There also appears to be a difference in the item "net nonoperating income" and this difference appears to be chiefly due to the fact that the accounting staff has included in this item interest on securities held by the company and interest accruals from other sources whereas this interest has been omitted from consideration by the company's accountants.

The company's exhibit of income and expense covering the eight months ended August 31, 1926, includes a charge of \$62,-099.52 as an estimate of depreciation accruing in the property during this period. At the rate charged the amount accrued for one year would be approximately ninety-three thousand dollars, which is equivalent to approximately six per cent on the plant account. This is approximately the average annual percentage which has been reserved for depreciation and included in operating expenses of these exchanges for the period 1913 to 1924, inclusive.

The engineering staff of the Commission submitted an estimate of annual accruing depreciation arrived at by applying an estimated average life to the original cost of each of the classes of plant, after deducting net salvage and this exhibit indicates an annual accruing depreciation in plant and equipment on the plant in service on December 1, 1925, amounting to \$84,395 which is 5.44 per cent of the total depreciable property. However, exhibits submitted by the accounting staff of the Commission show that the company actually charges direct to maintenance, a considerable portion of the expense, considered by the engineering staff as depreciation. As this portion is included in the maintenance expense in the foregoing table, it is manifest that it cannot also be properly included as "depreciation," and P.U.R.1928E.

that the percentage allowable for depreciation is considerably less than 5.44 per cent.

The telephone properties at Champaign and Urbana were acquired by the Illinois Bell Telephone Company on December 1, 1920, by purchase from the Central Union Telephone Company. This acquisition included the property in these communities that had for many years been operated by the Central Union Telephone Company and also properties that in the year 1918 had been purchased by the Central Union Telephone Company from the Home Telephone Company of Champaign county, a competitor in this territory.

The record shows that beginning with the year 1919 there have been made extensive replacements, rearrangements, and reconstruction of facilities by the Central Union Telephone Company and by the Illinois Bell Telephone Company (after its acquisition of the property on December 1, 1920). As a result of this rehabilitation the property has been almost completely rebuilt in the past five years. The company's books show its investment in plant and equipment as December 31, 1920, as \$745,100.62. During the five succeeding years 1921 to 1925, inclusive, property to the value of \$768,284.14 was retired from service. This means that the property comprising the plant account of five years ago has been retired at the rate of more than twenty per cent per annum. Wood's Exhibit No. 1 shows that plant now in service to have a prospective composite life estimated at 16.58 years. Based on this estimate the property now in service should in the future be retired at the rate of only 6 per cent per annum—in other words, less than one-third of the annual retirements of the past.

As the property now in service was installed during the last five years, its average age is somewhat over two years. The company in its exhibit of reproduction cost has deducted only 4.55 per cent, which it claims represents all of the depreciation which has taken place in the property. If this is all the depreciation that exists in the property, it follows that the annual depreciation on the present modern equipment has not been much in excess of 2 per cent.

The reconstruction of these properties involving the consolida-
P.U.R.1928E.

tion of competing telephone companies with the resulting scrapping of duplicate equipment and the operation of the properties under conditions not conducive to economical operation has resulted not only in extremely heavy charges to depreciation reserves for property retired but has also been reflected in the charges for maintenance and repairs; in fact, it is doubtful if there is in the records of the Commission another instance of a property of this size being operated over a period of years with such high percentages of repair, maintenance, and retirement charges. The following table prepared from data in the record of this case shows the charges relating to the Champaign and Urbana properties compared with similar charges of the so-called Illinois division of the Illinois Bell Telephone Company (which comprises properties throughout the state of Illinois, excluding the city of Chicago and suburban territory adjacent thereto.)

	Champaign			Illinois Division		
	% Maintenance.	% Net Charges to Reserve.	Combined Mtce. % and Charges to Reserve.	% Maintenance.	% Net Charges to Reserve.	Combined Mtce. % and Charges to Reserve.
5-year average	7.65	8.27	15.92	5.39	4.85	10.25
10-year average 1916-1925	7.25	5.44	12.66	4.83	3.67	8.50
13-year average 1913-1925	7.40	7.22	14.62	4.84	4.00	8.84

[2] From the foregoing statement it is evident that the record of this case presents a history of operation furnishing no reliable index to the cost of maintenance and depreciation of the property in its present condition. Changes in management and other factors have resulted in bookkeeping that has not always observed the same distinction between "depreciation" and "repair" or "maintenance" charges. Of course, the distinction between these items is principally a matter of bookkeeping and unless the books have been very carefully kept, injustice is liable to result from an attempt on the part of the Commission to determine in a rate proceeding the exact amount of revenue that shall be allowed for each of the two accounts separately. It is much safer from the standpoint of all concerned that an allowance be made for the aggregate amount needed to insure the upkeep of the property and provide against depreciation thereof.

P.U.R.1928E.

[3] Another factor in connection with the fixing of the rate of depreciation at this time is that the Interstate Commerce Commission on November 2, 1926, entered an order in Case No. 14700, 118 Inters. Com. Rep. 295, concerning depreciation charges of telephone companies, the Commission having been authorized under the Interstate Commerce Commission Act to fix the depreciation charges to be included in operating expense by telephone companies. This case has, however, been reopened and is now under consideration by the Commission. Under the order as entered such contingencies as obsolescence, inadequacy, public requirements and losses caused by extraordinary casualties are not to be provided for in advance to any great extent through the depreciation charge; at least not until it is evident that a particular cause will actually result in loss. Until the Commission has finally settled the question as the line to be drawn between "depreciation" and "maintenance" it appears advisable and unnecessary for us to, at this time, make such division.

Wood's Exhibit No. 1, referred to above, included a table of life, salvage, and annual depreciation charges for each class of property. This table contains much valuable data, but as it was prepared before the entry of the Interstate Commerce Commission's order relating to depreciation, it, of course, does not give consideration to the many important changes which are made by that order.

There is not sufficient evidence in this record on which to compute a rate of depreciation in accord with the definition of "depreciation" announced by the Interstate Commerce Commission and it is not known at this time what the Commission will include in "depreciation" when it enters its final order in the matter. There is, however, no necessity in connection with this case for a determination of a specific rate of depreciation that shall be charged for various classes of the company's property. We will, therefore, in this case find a single percentage of plant account to cover the aggregate cost of upkeep of the property, including current repairs, maintenance, and depreciation.

[4] After giving careful consideration to all of the facts in the record, we are of the opinion and find that there should
P.U.R.1928E.

be allowed for repairs, maintenance, and depreciation an amount equal to 9 per cent of the investment in fixed capital as an annual charge for repairs, maintenance, and depreciation. This will amount to approximately \$153,500. This matter should be checked and reviewed from time to time for the purpose of ascertaining whether the allowance here made is becoming either excessive or inadequate.

[5] Deducting the \$153,500 from the net income (before providing for the upkeep of the property) of \$260,000 leaves \$106,500 which would be equivalent to about 6.51 per cent return on \$1,637. In testing the rate herein the Commission has used for this purpose the lowest valuation of record which is the depreciated cost of the property submitted by the company from which has been deducted all intangibles such as going value or cost of developing business.

It is therefore *ordered* by the Illinois Commerce Commission that the Illinois Bell Telephone Company, be, and the same is hereby, authorized to continue in effect the schedule of rates authorized by this Commission in its order of June 25, 1925, as the legal rates for telephone service in the cities of Champaign and Urbana.

PENNSYLVANIA PUBLIC SERVICE COMMISSION.

CITIZENS COMMITTEE OF BOROUGH OF SUMMIT
HILL

v.

EAST PENN ELECTRIC COMPANY.

[Complaint Docket No. 7571.]

BOROUGH OF LANSFORD

v.

EAST PENN ELECTRIC COMPANY.

[Complaint Docket No. 7579.]

Commissions — Power to adjust employees' grievances — Street rail-ways.

1. The Commission has no power to determine the conditions upon
P.U.R.1928E.

which a street railway's striking employees should return to work, nor does it have jurisdiction in disputes over wages or terms of employment in public utility operation, p. 289.

Service — Traction discontinuance — Employees' strike.

2. A complaint against discontinuance of street railway service was dismissed for lack of jurisdiction where the utility showed that it was unable to operate its cars by reason of the failure of striking employees to return to work, p. 289.

[June 12, 1928.]

COMPLAINT by citizens of a borough against discontinuance of street railway service; dismissed for lack of jurisdiction.

By the Commission: [1, 2] The Commission has no jurisdiction in law nor has it warrant under the facts to grant the relief sought by the present complainants. The complaints are made against the discontinuance of service in the boroughs of Summit Hill and Lansford by the street railway department of the respondent company. No street railway service has been rendered in that district since January 6, 1928, due to a strike of the railway employees.

It appears that upon the expiration of a contract between the respondent and its railway employees, the respondent offered to renew the contract on the existing terms. The employees desired a modification of the contract in order that they would have seniority rights in the operation of motor busses as auxiliaries to the street railway service to the same extent as that already had in the operation of street railway cars. It was contemplated that motor busses would be operated by a subsidiary of the respondent company and not directly by the respondent. The respondent and its employees were unable to agree and a strike was inaugurated which has continued to the present time. No attempt has been made by the respondent to operate its cars during the strike in the territory affected although attempts to settle the strike have been made.

The Commission has no power to determine the conditions upon which respondent's employees should return to work nor does it have jurisdiction in disputes over wages or terms of employment in public utility operation. The Interstate Commerce Commission in its recent order dismissing the complaint of the P.U.R.1928E.

Brotherhood of Sleeping Car Porters v. Pullman Co. (No. 20,007) held that it had no power to regulate wages and no authority to inquire into the justness of the complainant's demands. The same rule applies in the present case.

From a consideration of the record the Commission is convinced that the complaints should be dismissed. An order will issue accordingly. [Order omitted.]

MISSOURI PUBLIC SERVICE COMMISSION.

R. W. MAKIN, Mayor of Grandview et al.

v.

MISSOURI PUBLIC SERVICE COMMISSION.

[Case No. 5641.]

Certificates — Procedure — Application on record — Electricity.

1. The Commission is not justified in issuing an order permitting an electric company to enter and serve competitive territory in a proceeding in which complaint is made against rates of the existing utility where the company has on record no application for a certificate of such authority but merely an informal letter offering certain rates if permitted to serve, p. 298.

Rates — Reasonableness — Comparisons — Electricity.

2. Rates will not be declared unreasonable simply by comparison with tariffs of companies in adjoining territory, wholly disregarding any consideration of the cost of similar service in different communities, the property employed in rendering the service, amounts fixed for depreciation and return, and other factors to be given necessary consideration in the fixing of rates, p. 298.

[June 8, 1928.]

COMPLAINT by Mayor and the inhabitants of a town against alleged excessive rate for electric service; dismissed without prejudice.

I.

Calfee, Commissioner: This case is before the Commission upon a complaint filed on behalf of the town of Grandview, Jackson county, Missouri, on December 22, 1927. This complaint is signed by H. W. Makin, mayor of Grandview, by the P.U.R.1928E.

city clerk and by about seventy-five other residents of said town. The complainants, or petitioners, allege that the town of Grandview and its inhabitants are now being served with light and power by the defendant, Missouri Public Service Company, successor to the West Missouri Power Company, successor to the L. K. Greene Light & Power Company of Pleasant Hill, Missouri; that the Kansas City Light & Power Company is serving the village of Martin City, three miles west of Grandview, and the village of Hickman Mills, $2\frac{1}{2}$ miles northeast of Grandview, and adjacent territories north and south of Grandview to within about one mile north of it; that the rates for the service of light and power by the Kansas City Light & Power Company are materially lower than the rates charged by the defendant, the Missouri Public Service Company; that the L. K. Greene Light & Power Company came in and began operating this service under a 10-year franchise in the incorporated town of Grandview which expired in or about April, 1927; that petitioners, including the town of Grandview, are entitled to the benefit of the Kansas City Light & Power Company and its rates, substantially lower than they are now compelled to pay the defendant. The prayer of petitioners is in the alternative. They ask for an order reducing the rates now being charged them by defendant to the lower rates being charged by the Kansas City Light & Power Company in the adjacent territory, referring particularly to Martin City and Hickman Mills, or, for an order permitting the Kansas City Power & Light Company to enter and serve the territory of petitioners at the same rates it serves Hickman Mills and Martin City and the adjacent territories.

On January 1, 1928, the defendant, Missouri Public Service Company, filed its answer to the above mentioned complaint. We will quote such parts of this answer as we deem essential to an understanding of defendant's position, as follows:

"Investigation of the situation by representatives of the company developed the fact that the predecessors of the company originally instituted electrical service in the town of Grandview at a time when the town and its inhabitants were unable to secure electrical service in any other manner or from any other company; that the service which the company is rendering is P.U.R.1928E.

satisfactory to the citizens of the community; that the only claim of the town and its inhabitants for lower electrical rates is based upon the fact that the town is adjacent to communities to which the Kansas City Power & Light Company has built its lines in recent years.

"2. That there are 232 electric consumers in the town of Grandview, of which 161 are residence lighting customers and 34 commercial lighting customers. The rates charged by the company for electrical service in the town are in line with and not higher than those effective in other communities of the same size receiving service from the company. However, the representatives of the company, having in mind the proximity of the somewhat lower rates in Kansas City and the desirability of making such adjustments as possible directly with the citizens themselves, prepared a new schedule for residence lighting and commercial lighting, as a reduction of these schedules would benefit and affect the majority of the consumers in Grandview. This proposal was outlined in a letter to Mr. J. W. Major, secretary of the Chamber of Commerce of Grandview on December 1, 1927, a copy of which letter is attached to this answer and marked Exhibit 'A.'

"3. The company avers that no reduction is warranted from the standpoint of the cost of service at this time, for a general application of the said rate to all communities served by the company would be disastrous to the company and would reduce its net earnings to an amount far below a reasonably adequate return upon the fair present value of its properties used in the public service; that the said rate which has been offered to the town of Grandview is only justified by reason of future economies in the cost of production and transmitting current, and by power interchange agreements which may be effected in this territory which will, to some extent, lower the cost of electrical service in this territory."

Attached to the answer is a copy of the letter referred to in the answer as Exhibit "A," being a letter from defendant to Mr. J. W. Major, secretary of the Commercial Club of Grandview, under date of December 1, 1927, setting out therein a proposed new schedule of rates, and indicating that defendant was willing
P.U.R.1928E.

to install these rates in Grandview if they were satisfactory to the complainants. However, defendant abandoned the proposition contained in its letter of December 1, 1927, and at the hearing presented another and different schedule of rates which it offered to file and put in force in the town of Grandview. It will, therefore, not be necessary to mention or discuss the proposed rates as set out in the defendant's said letter of December 1, 1927. The rates which defendant offered at the hearing will be referred to when we take up the evidence introduced at the hearing.

This case was heard before a Commissioner at Kansas City, Missouri, on March 1, 1928, and submitted upon the record.

II.

At the hearing, Mr. H. W. Makin, Mayor of Grandview, testified on behalf of complainants. He stated that the population of Grandview was about five hundred within the corporate limits and about eight hundred in the whole community; that Grandview has grown rapidly in the last two or three years and is still growing; that Hickman Mills is 2 miles north and $\frac{1}{2}$ mile east of Grandview and is a much smaller community than Grandview, having a population of not over one hundred people in the town proper; that Martin City is 4 miles west and maybe $\frac{1}{2}$ mile south of Grandview with about two hundred population. He stated that there is practically a unanimous desire of the whole community of Grandview for the reduction in rates asked for by complainants; that the defendant, Missouri Public Service Company, and its predecessors have been furnishing electric light and power service to the community of Grandview for more than ten years; that defendant's franchise expired in May, 1927. It appears that at the time the franchise was granted there were negotiations with two different companies relating to serving this community, the Kansas City Power & Light Company and the Greene Light & Power Company of Pleasant Hill, the predecessor of defendant company. With reference to these negotiations Mr. Makin stated that he thought that the Kansas City Power & Light Company wanted to be reimbursed a certain sum of money to run a transmission line and furnish the service and that P.U.R.1928E.

the Greene Company demanded no money but only asked for a franchise. He further stated that the transmission line of the Kansas City Power & Light Company now extends to a point at or every close to the corporate limits of Grandview.

Mr. M. V. Long who runs a general mercantile store at Grandview and is a member of the city council and of the Commercial Club testified for complainants. He corroborated and confirmed the statements made by Mr. Makin. He said that the higher rate at Grandview in comparison with Hickman Mills and Martin City is an injury to the community of Grandview.

Mr. J. W. Major, cashier of the bank in Grandview, and secretary of the Commercial Club testified along the same line as Mayor Makin. He stated that they were not using the modern electric appliances they would use if the cost of current was not so high and that practically 90 per cent of the houses are wired for electricity.

Mr. T. J. Murphy, assistant to the vice president of the defendant, Missouri Public Service Company, and an accountant of long experience in connection with rate matters testified on behalf of the defendant. Defendant offered in evidence its Exhibits No. 1 and No. 2, Exhibit No. 1 being a statement showing the present schedule of residence and commercial rates in force at Grandview and the proposed new schedule which defendant is willing to install. This exhibit is as follows:

The residence rates under the present schedule are as follows:

First 50 k.w.h. per month .....	.13½ per k.w.h.
Second 50 k.w.h. per month .....	.12½ per k.w.h.
All over 100 k.w.h. ....	.11 per k.w.h.

The residence rates under the proposed reduced schedule will be as follows:

First 5 k.w.h. per month per room .....	.11 per k.w.h.
Second 5 k.w.h. per month per room .....	.07 per k.w.h.
All over 10 k.w.h. per month per room .....	.03 per k.w.h.

Minimum monthly bill \$1.25 per month.

The present business rates are as follows:

First 45 k.w.h. per month .....	.12 per k.w.h.
Second 45 k.w.h. per month .....	.11 per k.w.h.
All over 90 k.w.h. per month .....	.10 per k.w.h.

P.U.R.1928E.

The commercial rate in place of present business rate, will be as follows:

First 60 hours use of maximum reservation .....	.11
Second 60 hours use of maximum reservation .....	.07
All over 120 hours use of maximum reservation .....	.04

Mr. Murphy stated that this proposed new schedule was offered to the citizens of Grandview on February 27, 1928, and that he, as assistant to the vice president of the company, submitted this offer in the record.

Defendant's Exhibit No. 2 shows a study of the rate situation at Grandview as made by Mr. Murphy and he testified at considerable length regarding the same and in support of the conclusions he reached as a result of such study. This Exhibit No. 2 is in the form of a letter from Mr. Murphy to Mr. A. V. Wainwright of the Inland Power & Light Corporation which appears to be the holding company of defendant and several companies in other states. In the first paragraph of this exhibit Mr. Murphy says:

"In the short time at my disposal I have made a hurried study of the Grandview rate situation. Due to the fact that a detailed investigation with its resultant apportionments and segregations on customary bases, such as, connected load, use of connected load, mileage and use of each transmission line involved, proportion of service on peak, direct expenses, district expenses, system expenses, etc., was not possible in the time allowed, I have had to use methods somewhat general in scope. For that reason I have, in each case, applied bases that I believe to be decidedly favorable to the complainants at Grandview so as to void discussion over theories or methods."

It is not necessary to set out this exhibit at length but a few excerpts therefrom will give a general idea as to the method used by Mr. Murphy. He says therein:

"I abstracted from our company records the total kilowatt hours and total operating expenses for all districts tied in with our generating plants. This excludes the following districts: F and H, being Trenton and Gainesville groups respectively. I then apportioned the operating expenses to Grandview on the basis of kilowatt hours sold to Grandview and to the entire dis-

tricts tied in to power plants. This basis is certainly favorable to complainants as it is giving them a common cost with communities much larger in population and possessing industries making a much greater use of their reservation in our facilities."

It will be observed that Mr. Murphy allocated operating costs on the basis of kilowatt hours used without regard to any other factor.

Again he says in this exhibit:

"We have taken as a basis of value the appraisal made of our properties as of December 15, 1926 by Hagenah & Erickson Engineering Company of Chicago. We have added, due to lack of time *nothing for additions to property since that time* although the appraisal showed that construction work in progress already done but not then in use exceeded \$416,700, and you know much additional plant has been installed since. The elements of plant used by me are as follows:

1st. Direct Grandview property.

2nd. The transmission line circuit immediately serving Grandview.

3rd. The three power plants, Pleasant Hill, Clinton and Warrensburg and the transmission lines direct from these three plants to tie in the Grandview circuit. (No. 2 above)."

In considering these three elements of valuation he assigns to Grandview all of the first element of plant, direct Grandview property. As to the second and third elements of plant he uses the same method that he uses in apportioning operating costs, that is, making the allocation on the basis of the kilowatt hours used by Grandview as compared with the total amount of kilowatt hours sold in the territory served by the plant element considered. As to the second plant element the per cent used is 11.4 per cent and as to the third 1.66 per cent. The whole study is, of course, based on records and computations of defendant company.

Mr. Murphy summarizes his conclusions in the last paragraph of the exhibit as follows:

"In conclusion I would call your attention to the fact that; *on present rates* after omitting all additions and betterments; P.U.R.1928E.

excluding all the transmission lines shown hereinbefore but using the kilowatt hours transmitted over them; ignoring the coal mine property and the \$6,000 of additions in Grandview vicinity and after reducing Hagenah & Erickson's going value, we still find that we are earning less than 10 per cent for return and depreciation on Grandview business, and I am confident that a detailed investigation on more accurate bases will considerably lower this resultant figure."

Mr. Murphy testified that his study was hurriedly made and that he did not have all the data necessary in order to make a complete study and reach accurate results. He does insist, however, that in every case he has used a basis favorable to the complainants and unfavorable to the company.

Mr. Murphy also stated that defendant company already had on file a combination lighting and cooking rate which would be retained as an optional rate—the customer to have the option of taking this rate, if desired, instead of the proposed new rate. He further stated that the present minimum charge of \$1.25 per month would not be changed, but it is evident that he here refers to the minimum for residence lighting because, in testifying with regard to the proposed commercial rate as shown in defendant's Exhibit No. 1, he added thereto the following: "with the minimum bill per month of \$1 per kilowatt per month per maximum reservation, with a minimum reservation of one kilowatt." And in connection with this proposed commercial rate he said that defendant could add to that a provision that the maximum reservation should be considered 85 per cent of the connected load, or actually to be measured, whichever the customer desired. In response to a question as to why his company could not make the same rates for Grandview that Hickman Mills and Martin City are receiving from the Kansas City Power & Light Company, Mr. Murphy said that on the present rates defendant was not making money on the property and had no big city like Kansas City to absorb the loss.

Complainants introduced in evidence the schedules of rates on file with this Commission of the Kansas City Power & Light Company for supplying electric current at Hickman Mills and Martin City. These rates are materially lower than defendant's P.U.R.1928E.

present rates at Grandview and also lower than the rates which defendant is now offering to make for Grandview.

Since the hearing, complainants have filed with the Commission a letter from Mr. F. S. Dewey, vice-president of the Kansas City Power & Light Company to Mr. Makin (evidently in reply to an inquiry made by Mr. Makin) in which Mr. Dewey says:

"You are advised that our rates for electric service to communities the size of yours and in the vicinity of Hickman Mills, Missouri, or Martin City, Missouri, would be the same as the rates which we have on file with the Public Service Commission of Missouri for each of said two towns."

III.

[1] This is not a case in which we have two different utilities applying for permission to serve the same town. We have before us no application from the Kansas City Power & Light Company for a certificate authorizing it to serve Grandview and said company is not a party to this proceeding; and the letter from its vice president, Mr. Dewey, indicates only that if this company was serving Grandview its rates would be the same as those which it has on file for Hickman Mills and Martin City. On the record before us we would not be justified in issuing an order permitting the Kansas City Power & Light Company to enter and serve complainants' territory.

[2] From a review of all of the evidence it will be seen that complainants have made no attempt to show the unreasonableness of the rates offered by defendant company from the standpoint of the return received by the company on the value of the property used in giving the service to their community, but rest their case solely upon the proposition that they are entitled to the same rates from defendant that neighboring towns are receiving from the Kansas City Power & Light Company. If we accede to this proposition it means that we are making rates simply by comparison of the rates of the two companies in adjoining territories and wholly disregarding any consideration of the cost of the service in the different communities, the value of the property employed in rendering the service, the amount earned for depreciation and return at the rates in question, and some other P.U.R.1928E.

factors which are usually given more or less consideration in fixing rates. Under the law governing our action in these cases we cannot agree with complainants' contention.

From one answer given by Mr. Murphy, it might be inferred that he thought it possible that the rates of the Kansas City Power & Light Company at Hickman Mills and Martin City were not adequate and that the loss was absorbed by the Kansas City territory, but there is no evidence in this case having any bearing on that question. Neither is there any evidence here from which we can reach a final definite conclusion as to the reasonableness of defendant's rates in the territory in question. The study made by Mr. Murphy does not take into account several factors which must be considered in any final determination of the matter. The Hagenah & Erickson appraisal which he has used as a basis of value has not been approved by this Commission for rate-making purposes—we have never made a valuation of defendant's properties.

However, the study made by Mr. Murphy, in the absence of other evidence on the point, makes a *prima facie* showing as to the reasonableness of the rates which defendant now offers to the community of Grandview. We also find from schedules on file with this Commission that these rates are as low, or lower, than rates which defendant is charging in other towns of approximately the same size. Defendant will be required to file and put in effect the rates which it offered at the hearing as shown by its Exhibit No. 1, with the additional provisions as testified to by Mr. Murphy, and complainants' petition will be dismissed without prejudice. An order will issue accordingly. [Order omitted.]

Brown, Chairman, Calfee and Porter, Commissioners, concur; Ing and Hutchison, Commissioners, absent.
P.U.R.1928E.

MAINE PUBLIC UTILITIES COMMISSION.**RE PORTLAND RAILROAD COMPANY.**

[R. R. 1434.]

Commissions — Judicial notice — Traction abandonment.

1. The Commission took judicial notice of the location of certain city streets and its personal knowledge of the traffic conditions thereon in passing upon a petition by a traction company to abandon portions of its city routes, notwithstanding the fact that the records contained no such descriptive evidence, p. 303.

Service — Evidence — Street railway abandonment.

2. The granting of consent for such extreme measures as contemplated by a petition to abandon a portion of a city traction system must be made in the presence of detailed, definite, and cogent proof, and nothing should be left to intendment, conjecture, or forced inference, p. 304.

Service — Statutes permitting substitution — Traction abandonment.

3. A statute (Chap. 47, Special Laws 1927) empowering a street railway company to use motor vehicles within the limits of its corporate territory upon the approval of the Commission and consent of local authorities, was held to be merely permissive and to go no further than to authorize new service, p. 304.

Service — Substitution of bus for traction service.

4. A change in the system of transportation from rail to bus service requires the presentation to the Commission of facts reasonably dispelling any doubt of the Commission's duty not to withhold such permission, p. 305.

Service — Abandonment — Evidence of necessity — Street railway.

5. The fact that a city contemplates the resurfacing of a street is not even inferential evidence of the city's desire that a Commission approve the removal of the rails and the abandonment of a traction system in such a street, p. 305.

Street railways — Presumption favoring city officials.

6. The Commission will assume that the municipal officers of a city will deal fairly with a street railway company in the matter of resurfacing a street, with resulting financial burdens, p. 305.

Evidence — Power of Commission to require information.

7. The Commission may reasonably require evidence of probable expenditures required of a street railway company for a proposed resurfacing of the city street and the relaying of rails, in passing upon a petition to abandon traction service over such street, p. 306.

Service — Abandonment — Factors to be considered — Street railways.

8. Before authorization of the abandonment of a portion of a city traction system is given, the necessity for such measures must be substantiated by evidence showing that all reasonable measures had been

exhausted which might preserve rail service, and that there are no other lines less remunerative and less to be desired from a practically economic viewpoint, p. 306.

[June 7, 1928.]

PETITION for authority to abandon certain portions of the street railway system of the Portland Railroad Company and to operate motor busses as substitute service on certain portions of the street railway system; dismissed.

Appearances: Leon V. Walker, Robinson Verrill, for Cumberland County Power & Light Company; Hon. H. C. Wilbur, corporation counsel, for city of Portland and town of Scarboro; Hon. Benjamin F. Cleaves; Hon. Wilford G. Chapman, Jr., for residents served by Morrill's-Riverton Line; Hon. Frank H. Haskell, for residents of towns of Windham and Gorham; Hon. Frederick W. Hinckley, *pro se*; Hon. George H. Hinckley, for residents of South Portland; Hon. Hiram Willard, Hon. Wesley Mewer, representing Old Orchard Board of Trade; Henry Cleaves Sullivan, representing New Riverton Park Company, Inc.; Mr. W. H. Buxton, representing town of Cape Elizabeth; Mr. Howard H. Waldron, representing Advisory Board of Transportation, Bureau of Portland Chamber of Commerce; Mr. George W. Blanchard, representing citizens served by Yarmouth-Portland Line, Cumberland Foreside; Mr. Frank M. Brown, representing citizens served by Yarmouth Line; Mr. Frank H. Osgood, *pro se*; Mr. Francis D. Chapin, representing citizens of Saco; Mr. Warren W. Cole, *pro se*.

Under contract dated February 1, 1912, the Cumberland County Power & Light Company obtained possession of and has since operated the street railway system serving the city of Portland and neighboring towns and cities. By this contract, which may remain effective for ninety-nine years from its inception, the Cumberland County Power & Light Company, lessee, assumes certain duties and obligations of the Portland Railroad Company, lessor, receiving all revenues and paying all operating expenses, including depreciation. Additionally to such expenditures the lessee binds itself to pay as annual rental a sum of money sufficient for interest on all bonds of the lessor presently P.U.R.1928E.

issued and to be issued, as well as annual dividends of 5 per cent upon all of the railroad company's capital stock. Details of such present obligations are:

<i>Amount of Bonds.</i>	<i>Rate.</i>	<i>Annual Charges.</i>
\$2,045,000	5%	\$102,250
1,600,000	3½%	56,000
<i>Amount of Stock.</i>		
\$1,999,000	5%	\$99,950

February 1, 1928, the petitioner as such operating utility, filed with this Commission a request for authority to discontinue service on certain portions of the street railway system as follows:

Spring Street Line—over High and Spring streets westerly to Bramhall street, all in Portland; South Portland Heights Line—from Summer and Ocean streets, South Portland, south-easterly to Town House, Cape Elizabeth; Saco & Old Orchard Line—from Westbrook street, South Portland to Saco and from Dunstan to Old Orchard; Windham Line—from Mosher's Corner, Gorham, to South Windham; Riverton Line—from Morrill's Corner to Riverton; Yarmouth Line—from westerly end of Martin's Point Bridge to Yarmouth.

The petitioner proposed, if it obtained such permission for discontinuance, to remove the tracks and equipment used in rendering its service, and to operate motor busses upon the following routes:

Spring Street Line,
Saco & Old Orchard Line,
Yarmouth Line.

Agreeably to order of the Commission, a public hearing was held in the city hall, Portland, on April 10, 1928. The case was then continued for further hearing in accordance with a stipulation of interested participants in the hearing which provided for the continued operation of the affected branch lines under experimental schedules, designed to evince the willingness of the company to maintain service, if practicable, and to furnish additional evidence of public support, or a lack of it, if suggested changes in service were adopted.

On May 18, 1928, the petitioner filed a motion to amend its
P.U.R.1928E.

petition by eliminating from consideration all of the involved lines excepting Spring street. No opposition appearing to this course, the amendment was allowed, with the consequence that the case now pending before us seeks the following objectives only:

A. Abandonment of Spring Street Line, including the removal of tracks and equipment.

B. Authority to operate motor busses over the Spring Street Line connecting by transfers with other portions of the system.

Hearing upon the petition, as amended, occurred at the city hall in Portland, May 22, 1928.

[1] While the record is barren of descriptive evidence concerning Spring street, we take judicial notice that Spring street, from its juncture with High street, runs in a westerly direction just southerly of and for a short distance nearly parallel with Congress street, which is the main thoroughfare of the city of Portland. The width of Spring street is approximately twenty-nine and six tenths feet. Relying further upon our knowledge of the situation, in the absence of evidence, we may state in the interest of clarity of thought that the Spring Street Line runs westerly from High street along Spring street to Neal street, thence to Carroll street, along which it courses to Vaughan street, thence along Vaughan street to Bramhall street, thence by Bramhall street to Congress street.

A memorandum exhibit presented in the case indicates the length of this line to be approximately one and thirty-eight hundredths miles. With propriety, we may also notice that the streets served by the Spring Street Line are in the older part of Portland, well built up; that this section of the city is prosperous, principally residential with but few community stores.

The general manager of the petitioning corporation testified that the cost of rendering street railway service upon the entire system for the year 1927 was forty-four and seven tenths cents per car mile, determined by adding to the operating revenue for 1927 \$1,296,423, the deficit for the same year of \$171,853, a total cost of the service of \$1,468,276, and dividing such latter figure by car miles of service during 1927, aggregating 3,285,666.

P.U.R.1928E.

Testimony was offered of deficits accruing through the years since 1912. It would not be profitable to discuss these at length and it is seemingly sufficient to say that these appeared in 1926 as \$127,812.10 and in 1927 as \$171,853.32. The revenues from railroad operations for the same two years fell from \$1,402,767.24 in 1926 to \$1,296,423.69 in 1927.

At the earlier hearing of April 10, while testimony applicable to several of the branches was given in some detail, no specific evidence was given in respect of the Spring Street Line. The petitioner offered no evidence at the hearing to May 22, but testimony was submitted by a representative of the city of Portland in relation to plans for the resurfacing of Spring street.

We are not satisfied that the method of showing the Spring Street Line operated at a deficit of \$11,561 for 1927, appearing in Exhibit 10, justifies a finding that the line is not remunerative. The 44.7 cost per mile may not apply to Spring street unqualifiedly. The general manager terms his conclusions "practically all estimates." While mathematical accuracy is not required, we feel the evidence lacks a convincing definiteness which greatly minimizes its persuasive quality.

[2] In our opinion, the granting of consent for the extreme measures contemplated by the petitioner should be in the presence of proof, detailed, definite, and cogent. Nothing should be left to intendment, conjecture, or forced inference.

[3] The charter of a corporation is a contract between the state, the stockholders, and the corporation itself. The charter of the Portland Railroad Company grants it exclusive privileges of vast extent and importance. It lays upon it the serious duty of operating a street railroad system and of rendering adequate and reasonable service, and the statutes emphasize this duty in language that is not obscure. The Portland Railroad Company and its lessee, the petitioner, enjoy the sole privilege of transporting passengers by such means within the city of Portland. In 1927 by Chap. 47 of the Private and Special Laws the Portland Railroad Company was empowered to use motor busses and other vehicles propelled by gasoline, electric or other power within the limits of its corporate territory, upon securing the approval of this Commission and the consent of the municipal
P.U.R.1928E.

authorities. This act is merely permissive; it goes no further than to authorize such new service. This statute doubtless has its origin in business prudence and alert understanding of modern requirements in transportation.

Our determination of the question presented dispenses with the necessity of deciding our authority to consent to abandonment of service and the removal of the tracks and equipment along the Spring Street Line.

[4] While operating experience or emergent circumstances may show the expediency or the necessity of abandoning a street railroad service previously rendered by rails laid in the streets of municipalities, and the substitution of motor vehicles, reasons for such a course should be clear, assuringly decisive, unequivocal and re-enforced by pertinent evidence.

The reasons impelling the management to such a change we may assume to have been well grounded and their decisions to have been reached after study. Such a change in the system of transportation requires, we think, the presentation to the Commission of facts reasonably dispelling any doubt of the Commission's duty not to withhold such permission. The evidence in the present case falls far short of meeting this standard of proof.

[5] That the city contemplates the resurfacing of Spring street does not inform us even inferentially of the city's desire that we approve the removal of the rails and the abandonment of this old branch line through this section. No vote of the city council has been presented to us manifesting the judgment of those charged with the management of the city of Portland that the present system of transportation by rail is objectionable and should be discontinued.

[6] The fear suggested that the contemplated resurfacing will result in the imposition of a burdensome contribution from the petitioner is a shadowy thing and finds no foundation on which to rest in the evidence. We have no reason to believe that the municipal officers of the city of Portland will deal otherwise than with generous fairness with the petitioner in this matter.

That any onerous or financially crippling charge will be
P.U.R.1928E. 20

laid upon the railroad company if the rails remain, is entirely conjectural.

[7] It is true that able Commissions have enunciated the doctrine that under some circumstances abandonment of a street railway line is preferable to the expenditure of unwarranted sums of money by a financially enfeebled street railway, but such a doctrine on the evidence is not applicable to the present case. If we assume it, we are doing so without logical basis, and as we have emphasized, in cases of this importance, the Commission must not be left to explore dark caverns of speculation. The case shows us nothing that apprizes us of the probable expenditures required if Spring street be resurfaced and the rails relaid.

We believe we may reasonably require evidence of such probable financial requirements, from a company of such wide experience, with engineers qualified to make dependable reports and estimates. How would such cost compare with the purchase and operation of the proposed bus system? Which would be greater? How may this be determined if no evidence be submitted?

[8] The abandonment of a street railway system in these latter days, when so many of our citizens provide their own transportation by private automobile, may sometimes be of imperative economic necessity, but such should be substantiated by evidence before the company resorts to an abandonment of its public duties, even with substituted service, in the heart of a populous and prosperous city. Have all reasonable measures been exhausted which might preserve the street railway line for public use? Are not other lines less remunerative and less to be desired from a practicably economic viewpoint?

A careful review of all the evidence in the case fails to persuade us that the prayer of the petitioner should be granted, and it is accordingly *ordered, adjudged and decreed* that the petition be dismissed.

P.U.R.1928E.

NORTH CAROLINA CORPORATION COMMISSION.

BUREAU OF LIGHTHOUSES, UNITED STATES DEPARTMENT OF COMMERCE

v.

SOUTHERN PUBLIC UTILITIES COMPANY

[Docket No. 6640.]

Rates — Electricity — Flying field beacons.

Consumption of airway beacons for the development of commercial aeronautics is so low that it does not justify making a special rate for this service where such reduction would result in losses to the company and discrimination against other consumers.

[May 14, 1928.]

PETITION of the Bureau of Lighthouses (United States Department of Commerce) for special rates for aeroplane beacon lighting; dismissed.

By the Commission: This is the petition of the Bureau of Lighthouses, United States Department of Commerce, having in charge the construction, supervision, and management of airway beacons, towers, and landing fields for commercial aviation under the Air Commerce Act for encouraging and fostering commercial aviation.

The petitioner contends in order that the fullest advantages may be obtained from air commerce, it is necessary that airways be operated by night as well as by day; and, to the end that night flying may be accomplished with the maximum safety to pilots and passengers, the Department is marking the routes by electrically lighted intermediate landing fields at 30-mile intervals with beacon lights at 10-mile intervals between these fields; that the connected load at each intermediate landing field is approximately two and three tenths kilowatts and the energy consumption about eight hundred kilowatt hours per month, while each beacon between the fields has a load of approximately one and six tenths kilowatts and an energy consumption of about six hundred kilowatt hours per month, all lights at both types of beacon being lighted from sunset to sunrise each night in the P.U.R.1928E.

year, the loads being fractional horsepower motors as well as lighting at each site. The petitioner prefers to obtain commercial power at each site rather than to use engine-generator sets, because through the use of control devices such installations are semi-automatic. Petitioner contends that in states where this new use of electricity has not already been considered, there is no rate that adequately covers this service; that airways are laid out, as nearly as practicable, in a straight line, necessitating the location of lights, or fields, at isolated places some distance from the transmission trunk lines from which power is available; that the government is prepared to pay its proper share of the cost of power to these sites and is willing to purchase outright pole line extensions and to maintain them. From its previous experience, it is found that power companies in general are willing to expend a sum equal to from two and one-half to three times the estimated revenue from a beacon to be served in constructing the pole line extension to such beacon; that this sum may be increased in the same proportion by revenues obtained from additional customers using power from these extensions; the excess, if any, in construction cost is then charged to the Department of Commerce and paid by monthly service charge until amortized, with provision in the contract that protects the power company in the event of unforeseen necessity of discontinuance of airways service before the monthly service charges shall have amortized the government's share of construction cost.

The respondent, the Southern Public Utilities Company, states that it does not serve communities affected in this state south of Salisbury because the route is laid via Mooresville and Gastonia; that the Salisbury site is 1500 feet from its transmission trunk, that at Thomasville, 17,424 feet; High Point, 8,448 feet; Greensboro, 6,336 feet; Reidsville, 26,400 feet; that to serve such points even at regular lighting rate which it has in force for all lighting customers would be unremunerative; that if it were to undertake to serve this airway route at anything less than its regular lighting rate, the loss in such service would be prohibitive. The respondent further states that it does not give special power rates until a demand of two P.U.R.1928E.

horsepower or over is made and the single-phase current up to two horsepower is and has been the custom of the company and 3-phase over that; that it cannot change its policy in this case without discriminating against other customers and that it would be giving a rate which to that special service would show a loss and would have to be made up by other classes of service on its regular lighting rate if the company received any remuneration from any source therefor; that in order not to delay construction or installation of the fields and beacons, that they have gone ahead and built the connections in co-operation with the Department of Commerce; that the total cost of such installations, except that at Greensboro which was estimated, is approximately fifteen thousand dollars, a large part of which would be repaid by the government during the process of the amortization; that the company will maintain the lines and keep them in order so as to deliver the power under its contract at all times. Respondent further claims that in any event each site must be served by a separate transformer and the loss of energy will about equal the consumption. The petitioner also contends that consideration should be given to the uniform load from sunset to sunrise each night throughout the year. The respondent says if this were not true, it would be impossible to render the service the distance from its transmission trunks at the rate which it has offered because of the small load demand.

The Commission has made a lighting rate which is uniform for the customers of the Southern Public Utilities Company and the reasons advanced for a less rate for the airways service are prompted by the desire of the Department of Commerce for airways development. The consumption at such stations is so low that it does not justify the making of a special rate for this service and especially not without creating a loss to the company for that particular service because of the reasons advanced above. In this case, the respondent has filed with the Commission its lighting rate, making it applicable to the airways service. This is an untried field for local utilities and it may be that the future will develop just what is a reasonable rate and special attention will be given in the future to the result of the rates in connection with this service in order that the Commission P.U.R.1928E.

may ascertain what is reasonable and just. The respondent has made considerable concession in the installation of a service that it considers will be unremunerative and the Commission does not feel that concession should now be made in the matter of rates until the service has been tried and its result demonstrated; therefore, it is

Ordered, that the case be dismissed and that the rate previously filed by the Southern Public Utilities Company with the Commission applicable to other lighting service is hereby approved for application to this service from and after its installation.

MISSOURI PUBLIC SERVICE COMMISSION.

R. C. DESALME et al.

v.

UNION ELECTRIC LIGHT & POWER COMPANY.

[Case No. 5852.]

Commissions — Judicial power.

1. The Commission is not a court and has no judicial power, p. 314.

Commissions — Duty to take cognizance of pertinent law.

2. It is the duty of the Commission to take cognizance of all law applying to it and to exercise every legal duty and responsibility placed upon it, recognizing that it is only an administrative body and that its powers and duties are not judicial, p. 314.

Service diversion — Commission jurisdiction — Discontinuance for unlawful.

3. The Commission has jurisdiction to determine whether or not a consumer to whom service has been discontinued because of alleged unlawful diversion of current is guilty of such charge in order to prevent discrimination in service, p. 315.

Service — Discontinuance for improper action — Lack of proof.

4. Service discontinued because of alleged diversion of current was ordered to be resumed where the charge was denied by the customer and where the company failed at a Commission hearing to substantiate such charge with any proof, p. 315.

[August 20, 1928.]

P.U.R.1928E.

COMPLAINT against electric utility for discontinuance of service; service ordered to be resumed.

Statement:

Ing, Commissioner: On May 7, 1928, R. C. DeSalme and Lucille DeSalme filed with this Commission a complaint against the Union Electric Light & Power Company, in which it is alleged that said defendant discontinued electric service to complainants without just cause. Complainants alleged that they are citizens and property owners of St. Louis county, Missouri; that in August, 1927, they contributed a sum of money in excess of two hundred dollars toward the payment of the cost of the establishment of electric service in their residence and thereafter duly paid to defendant all charges assessed by defendant for electric service, but that on or about the — day of —, 1927, said company, without legal or just cause, cut off and discontinued all electric service to and for the said complainants' home. Complainants, therefore, pray for an order on defendant requiring it to restore said service.

The defendant in due time filed a motion with the Commission to dismiss the complaint herein on the ground that this Commission has no jurisdiction of the subject-matter of the complaint. Defendant, in its motion, alleges that on or about May 26, 1927, the defendant discovered that the complainants had and maintained upon their premises a by-pass connection or other device which prevented or would prevent the meter on said premises from registering the total electrical energy used by complainants; that on June 2, 1927, the defendant discontinued service to complainants by reason of the matters and things aforesaid, and that the question of whether or not plaintiffs are entitled to service depends upon whether or not plaintiffs had upon their premises any connection, device or by-pass which would have prevented and did prevent the meter from registering the electrical energy consumed by them and whether or not said complainants had honestly and in good faith fully complied with the rules and regulations of the defendant company; that said controversy is a judicial question and beyond the power and jurisdiction of this Commission to hear and determine. Defendant further alleges
P.U.R.1928E.

that the attempt by the Public Service Commission to exercise jurisdiction of this cause is in contravention of Article III of the Constitution of the state of Missouri, and that any order rendered by this Commission requiring the defendant to render service to the plaintiffs would be in violation of § 30, Article II of the Constitution of the state of Missouri and in violation of Amendments 5 and 14 to the Constitution of the United States.

This case was heard by a member of the Commission at St. Louis, Missouri, on the 27th day of June, 1928.

Facts:

The testimony adduced at the hearing of this cause shows that the complainants live on Cravois Road west of Clayton, in St. Louis county, Missouri, where they have resided for the past seven years; that they own their home and first received electric service from the defendant in April or May, 1927; that they had two lights, one in the kitchen and one in the dining room, and that the service was discontinued after approximately four weeks' use, Mrs. DeSalme testified that a representative of the defendant company came to her home, entered without knocking, went to the meter and remained there for approximately two minutes and walked out again without saying anything. She further stated that neither she nor her husband had received any bill or any notice, and had no knowledge of any complaint prior to that time. Mrs. DeSalme also stated that there was no device in her home for the purpose of diverting current and denied that any such device had been used there. She further stated that after the service at her home had been discontinued she went to the office of the company and there had a conversation with the assistant treasurer of the company, and was informed by him that the service had been discontinued for the reason that a piece of wire designated as a U jumper had been found on the premises, and that service would be restored upon condition that complainants pay a sum of money for the construction of a lock box and for the estimated amount of diverted electric current, or, as the witness expressed it, a \$5 fine. This complainants refused to do.

No one testified that there was any device at the home of com-P.U.R.1928E.

plainants for diverting electric current or that any electric current had been diverted. A witness was at the hearing whom counsel for defendant stated was in possession of that information but he was not placed upon the witness stand for the reason, as stated by defendant's counsel, that "we don't want to offer any evidence to show that Mrs. DeSalme was actually using a device of this kind because of the position we have taken before the Commission that it has no jurisdiction to try that kind of controversy."

Defendant offered in evidence a copy of the notice sent by defendant to Mrs. DeSalme, which notice states as follows:

"One of our men recently discovered an irregularity in your method of obtaining electric service. This is to advise you that as a result thereof your electric service will be discontinued on Thursday, June 2, 1927."

The testimony shows that the service was discontinued on June 2, 1927, and has not been restored.

Defendant also offered in evidence a copy of defendant's rule with reference to the use of devices for diverting electric current, which said rule is as follows:

"If connections or any device are found on the premises of the consumer which prevent the meter from registering the total energy used or to be used, the company shall have the right to disconnect its service."

A brief was filed by counsel for defendant in this proceeding which was mainly devoted to argument and citation of authorities to show that the Public Service Commission is not a court and has no judicial power.

Conclusions:

The question of jurisdiction must first be passed upon. This Commission, since its creation, has assumed jurisdiction of rates and service of all public utilities under its control, believing that the law imposed that duty upon it. If it is the duty of this Commission to require public utilities to render adequate service to their patrons, without discrimination, and to charge therefor just and reasonable rates, then the Commission has jurisdiction of this case, but if it is not the duty of the Commission to regu-
P.U.R.1928E.

late the service of public utilities, and prevent unjust discrimination, then it has no jurisdiction of this case.

[1] This Commission has so often stated that it is not a court and has no judicial power that it seems it ought to be unnecessary to repeat it. In one of the very early decisions rendered by this Commission, in the application of the American Refrigerator Transit Company, for an order authorizing the issuance of equipment gold notes, issued June 3, 1913, the Commission stated:

"The Commission is not disposed to assume jurisdiction unless fully satisfied such jurisdiction exists." Vol. I, Mo. P. S. C. R. 29.

In the same volume at page 699, in the complaint of Jackson v. Kansas City, St. L. & Chicago R. Co. the Commission stated: (Quoting from syllabus)

"The constitutionality of the Public Service Commission Law is a question of law for the decision of the courts, and this Commission is not disposed to consider such question."

[2] In the case of Rhodes-Burford House Furnishing Co. v. Union Electric Light & P. Co. reported in Vol. II, Mo. P. S. C. R. 656, P.U.R.1916B, 645, the Commission specifically stated that it is not a court, and that the Commission is without jurisdiction to enter an order directing a refund of overcharges for electric service as requested, for the reason that the issues of the cause could be determined only by a court of justice. The Commission, however, does not believe that because it is not a court it should refuse to take cognizance of the law, but to the contrary the Commission is of the opinion that it is its duty to take cognizance of all the law applying to it and to exercise every legal duty and responsibility placed upon it, recognizing that it is only an administrative body and that its powers and duties are not judicial.

As previously stated, the Commission understands that the Public Service Commission Law places upon it the duty to regulate and supervise the rates and service of public utilities. Section 10425, Revised Statutes 1919, provides as follows:

"The jurisdiction, supervision, powers, and duties of the Public Service Commission herein created and established, shall P.U.R.1928E.

extended under this chapter . . . to the manufacture, sale or distribution of gas, natural and artificial, and electricity for light, heat, and power, within the state, and to persons or corporations owning, leasing, operating, or controlling the same; and to gas and electric plants, and to persons or corporations owning, leasing, operating, or controlling the same."

Subdivision 3, of § 10477, provides as follows:

"No gas corporation, electrical corporation, water corporation, or municipality shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

[3, 4] The defendant contends that this Commission has no authority under the law to determine whether or not complainants have been unjustly deprived of service but that it is a judicial question and can only be determined by the courts. There can be no doubt that if complainants or either of them were guilty of using a device for diverting electric current, defendant was justified under its rule on file with the Commission in discontinuing service to them, but the Commission does not understand the law to be that the patrons of public utilities must accept the statement of the utility or of some employee with regard to their infraction of some rule of the utility, or be compelled to go to the courts in order to obtain the service for which they are ready to pay. If that is the law, the Public Service Commission has no power to prevent discrimination and public utility patrons will be placed at a great disadvantage.

The Commission is of the opinion that it has no authority to determine what amount, if any, the public utility patron should pay for current that has been diverted, when they are in fact guilty of diverting current, because that is a question to be determined by the courts. In this case, however, there was no proof whatever that complainants were guilty of using a device for diverting electric current, or that they, in fact, diverted any
P.U.R.1928E.

electric current. Therefore, if this Commission has jurisdiction of this case and has the right to render a decision, it is compelled, under the proof, to find that complainants are not guilty of diverting electric current; that they did nothing that would justify the defendant in discontinuing service to them, and that they have been unjustly discriminated against. It is true, they are charged with unlawfully diverting electric current, but that charge was denied. Surely they cannot be subjected to the extreme discrimination of being deprived of service because some employee of the defendant charges them with the infraction of a rule of the company. Has the Public Service Commission no power to prevent such discrimination? We think it has.

From the foregoing it clearly appears that the Commission is of the opinion that it has jurisdiction of this cause and it will so hold.

After a careful consideration of all of the facts developed in this case, the Commission finds that the complainants have been unjustly discriminated against in that they have been deprived by defendant of electric service, and we further hold that the defendant should immediately restore electric service to complainants and thereby remove the discrimination complained of.

Brown, Chairman, Porter and Hutchison, Commissioners, concur; Calfee, Commissioner, absent.

MISSOURI PUBLIC SERVICE COMMISSION.

RE J. P. CAYCE.

[Case No. 6057.]

Railroads — Abandonment — Permission to junk.

Authorization was given to the purchaser of a portion of a railroad not in operation for ten years to junk and remove ties, tracks, bridges, and other equipment where there was no likelihood of public necessity ever requiring a continuation of operation of such lines and P.U.R.1928E.

where no objection was made by civil and judicial authorities in the area affected.

[September 7, 1928.]

APPLICATION by the purchaser of abandoned portion of a railroad for authority to junk the same; permission granted.

By the **Commission**: The Cape Girardeau Northern Railroad Company formerly owned and operated a line of standard gauge steam railroad from Ancell, Scott county, Missouri, to Cape Girardeau, thence in a northerly direction to West Chester, Missouri, a total distance of 68 miles. A branch line, part of which is concerned in the application herein, also extended from Saline Junction, which is about twelve miles south of West Chester, toward the west, a distance of 35 miles, to the city of Farmington, Missouri.

J. P. Cayce, a resident of Farmington, Missouri, and the applicant herein, avers in his petition that by virtue of a final decree and order of sale made by the Cape Girardeau court of common pleas, dated March 21, 1924, he was the highest bidder and became the purchaser of the "fifth parcel" of said railroad properties for which he now seeks the authority of this Commission to take up and remove all of the rails, spikes, angle bars, ties, old switches, and other property now on the right-of-way of said railroad between Minnith, Missouri, and Farmington, Missouri, and to dispose of the same for junk.

That part of said railroad of which the applicant represents himself as the purchaser, at a public sale held at the east door of the court house in the city of Cape Girardeau, Missouri, on September 12, 1927, under the decree of the said court of common pleas, and which is hereafter referred to as the "fifth parcel," is described as follows:

"That part of said railroad, approximately thirty-five miles in length, beginning at the point known as and called Saline Junction in Perry county, Missouri, where the same connects with the above mentioned railroad running from the city of Perryville to West Chester, thence extending in a general westerly direction through Perry, Ste. Genevieve and St. Francois counties, Missouri, to a point at, in, or near the city of Farming-P.U.R.1928E.

ton, Missouri, and together with and including all real estate and interests in real estate and all depot and terminal grounds belonging to the railway company in the city of Farmington, and together with and including all property appurtenant to said railroad between said two points and all the rights, privileges, and franchises belonging or appertaining thereto; subject to the prior lien of the holders of \$10,000 par value of bonds of the Saline Valley Railroad Company to the St. Louis Union Trust Company, as trustee, recorded in the office of the recorder of deeds of Ste. Genevieve county, in Volume 67, Page 175."

It is also represented in the application that the said J. P. Cayce owns and controls as attorney all of the \$10,000 of par value of bonds of the Saline Valley Railroad Company, dated September 20, 1903, with accrued interest thereon, which are outstanding and unpaid and which are a lien upon the said "fifth parcel" of the railroad above described.

Applicant further avers that the master, appointed by the court to make said sale, made a report of the sale to the Cape Girardeau court of common pleas and that on September 26, 1927, the said court did approve and confirm the sale of the said "fifth parcel" described above to J. P. Cayce, and that by order of said court the master executed and delivered to J. P. Cayce, a deed conveying to him the said "fifth parcel" and that the said J. P. Cayce represents that he is still the owner of approximately twenty-five miles of that portion of said railroad designated as "fifth parcel" and described above, being that part beginning at Minnith, in Ste. Genevieve county, Missouri, and extending in a westerly direction through Ste. Genevieve and St. Francois counties, Missouri, to a point at, in, or near the city of Farmington, Missouri.

In support of this petition, the applicant represents that the portion of the railroad above described has long since been abandoned by the said Cape Girardeau Northern Railroad Company as a railroad, and that the said railroad company more than ten years ago ceased to operate the same as a railroad; that no train has been operated over that portion of said tracks for more than ten years, and that the physical condition of said tracks is such that it would be impossible to operate the same as a railroad.
P.U.R.1928E.

The application was accompanied by letters signed by J. W. Boswell, presiding judge of the county court of St. Francois county, Missouri, F. A. Weiler, presiding judge of the county court of Ste. Genevieve county, Missouri, and C. A. Tetley, mayor of the city of Farmington, Missouri, in each of which it was stated, in substance, that notice of this application by the said J. P. Cayce had been received by each of the interested parties and that there is no demand on the part of the people in each of the respective communities represented that the railroad be rebuilt and again placed in operation. It was also stated in each of the letters that the Cape Girardeau Northern Railroad had ceased to operate that portion of the above railroad sought to be removed and junked more than ten years ago and that the present physical condition of the track, ties, and bridges would make it impossible to operate a train over that portion of said road.

Mr. George W. Cross, receiver of the Cape Girardeau Northern Railroad Company, in a letter to the Commission, relative to the application herein, states in substance the same facts regarding the condition of that portion of the road under consideration and calls attention of the Commission to a decision rendered by it in Case No. 1384, reported in Vol. 6, Mo. P. S. C. R. 476, P.U.R.1919A, 494, wherein this Commission did not require the receiver of the railroad herein involved to restore service over the abandoned portion of the railroad where said receiver was acting in accordance with an order of the court having charge of the railroad.

In the case referred to, which was decided by this Commission October 18, 1918, and which was an action brought to restore service over a portion of the railroad herein sought to be junked, the Commission said, "The receiver in discontinuing the operation of the railroad between the points named in the complaint was acting under the order of the court (Cape Girardeau court of common pleas). The Commission will not undertake to review or pass upon the legality of that order, but will leave the complainants to seek the relief sought herein by an application to the court to modify its order."

Taking into consideration all of the facts presented herein, that the portion of the railroad sought to be junked has not been
P.U.R.1928E.

in operation for more than ten years, that the presiding judges of the county courts and the mayor of the city of Farmington, in which the tracks, ties, bridges, etc., sought to be junked are now located, have no objections to the removal of such idle and useless properties of the said abandoned line of railroad, and that there is no public necessity for the continuance of said line of railroad in its present location, it appears to the Commission that the authority sought herein should be granted.

Brown, Chairman, Calfee, Porter, and Hutchison, Commissioners, concur; Ing, Commissioner, absent.

P.U.R.1928E.

NEW JERSEY BOARD OF PUBLIC UTILITY COMMISSIONERS.**ALEXANDER GOULD***v.***PUBLIC SERVICE ELECTRIC & GAS COMPANY.*****Rates — Check meter — Billing — Regular conduct of consumer.***

An electric company properly rendered bills based on a reading from a check meter located outside of the premises occupied by a patron, himself a practicing electrician, whose service meter had on previous occasions given evidence of tampering or by-passing.

[September 6, 1928.]

COMPLAINT against alleged overcharge for electric service; complaint dismissed.

Appearances: Alexander Gould for the complainant; George H. Blake for the company.

By the Board: The complainant in this case, Alexander Gould, occupies premises in the city of Trenton, supplied with electricity and gas by Public Service Electric & Gas Company. Mr. Gould submitted to the Board a complaint, which was to the effect that charges for electricity were excessive and because of the nonpayment of the bills service had been disconnected. Service was reconnected pending investigation.

From the testimony it appears that at some time in the early spring the Public Service Company was not satisfied that the electrical energy supplied to Mr. Gould's residence was being properly registered on the meter, and as a result a separate and distinct meter was installed in a box on a pole adjacent to Mr. Gould's residence, and so connected as to measure all of the current used in the complainant's premises. Readings were taken on the check meter located on the pole at the same time that they were also taken on the meter located within the house. The meter on the pole, which had been tested by the company on July 14, 1928 and found to be correct, indicated that more current was being used in the premises than was being shown on the meter within the house, and assuming from this that there was some tampering with the house meter, the company billed Mr. Gould in accordance with the readings of the check meter located

on the pole. The matter was at first investigated by an inspector of the Board but not being satisfied with the report, Mr. Gould asked for a hearing, which was duly held on July 24, 1928, at the Board's rooms in Trenton.

Further testimony given at the hearing develops further the fact that Mr. Gould had been a practicing electrician for about eighteen years, and further that on a previous occasion there had been indications that the service meter in his premises had been tampered with or had been by-passed.

Mr. Gould's contention is that the company had no right to render bills based upon a check meter located upon the pole, and this appears to be the only point which the Board need pass upon. An examination of the records and of the instrument itself shows that the meter on the pole is a standard house type instrument, was duly tested, as stated, on February 14, 1928, and found to be correct within the allowable limits, and an inspection of the connections of this meter shows that the meter registered all of the electrical energy being delivered to Mr. Gould's premises, and also that the service wires and meter carried only the energy going to Mr. Gould's premises.

The Board finds and determines, therefore, that the company was acting in a proper manner in basing its bills upon the check meter installed upon the pole. In consequence, the complaint will be and is hereby dismissed.

MISSOURI PUBLIC SERVICE COMMISSION.

RE LEXINGTON WATER COMPANY.

[Case No. 5522.]

Valuation — Original cost — Necessity for consideration.

1. Original cost of utility property should be included in the considerations affecting fair value and rates, p. 339.

Valuation — Property now owned by company — Railroad tracks.

2. Capital expended by a water company in items of property, such as railroad tracks serving its plant and a distribution main serving a railroad company, although not owned by the water company, should be included in the cost of property of the latter until such time as they are removed and abandoned, p. 339.

P.U.R.1928E.

Depreciation — Probable life table — Water pipes.

3. It was held to be highly illogical to assume that the probable future life of all water pipes of a system should be classed the same and given the same expected life, or that the smaller galvanized pipes should carry the same expected life as the larger and heavier galvanized pipes, p. 341.

Depreciation — Consideration of future life — Steam pumping.

4. The fact that electric pumping equipment can be installed and operated at a great saving over the current operation of a steam pumping equipment, should be reflected in consideration of the probable life of the latter for valuation purposes, p. 342.

Valuation — Franchise expense.

5. A utility should be allowed to capitalize any expense actually made in obtaining a franchise, and such expense should accordingly be included in the present fair value of the property, p. 343.

Valuation — Going value — Basis for allowance.

6. Going value is a matter of judgment to be based on all the facts in each particular case, and the fact that the Commission has allowed a certain amount in another case or in a group of cases, should reflect in no way the going value of a utility involved in a subsequent proceeding, p. 344.

Depreciation — Amount allowed — Water company.

7. An allowance of \$4,500 a year was made to provide a fund for the retirement of a physical property of a water company having a total fair value of all elements in the amount of \$285,000, p. 344.

Discrimination — Free service to municipalities — Water.

8. Free service to a municipality for use in its public buildings is a discrimination against other consumers, and the city should purchase its water on a metered basis the same as other consumers, p. 345.

Discrimination — Large consumers — Water.

9. A special rate of 21.7 cents per thousand gallons to six large consumers of a water company was held to be proportionately inadequate where the combined production and distribution expense was 20 cents for a like amount, p. 345.

Evidence — Operating inefficiency — Water utility.

10. That the production cost of water in one city was excessive as compared with the same costs in other similar cities was taken as one indication of obsolete pumping equipment, low load factor, and a possibility of more economical administration, p. 345.

Return — Reasonableness — Necessity for good management.

11. The right of a utility to earn an adequate return on the fair value of its property is subject to the limitation that its affairs must be conducted in a reasonably efficient manner so as to earn the same if possible, p. 346.

[September 20, 1928.]

P.U.R.1928E.

APPLICATION of a water company for increased rates; rates adjusted.

By the **Commission:** On October 12, 1927, the Lexington Water Company filed application herein asking that the Commission enter its order authorizing the company to make effective rates and charges for its water service at Lexington, Missouri, which will enable the company to earn its reasonable operating costs, an adequate rate of return upon the fair present value of the company's property devoted to the public service, and an adequate amount for annual depreciation reserve, and for any further order or orders as may appear just and proper.

Briefly, the application states that the applicant herein has not for a number of years made an adequate return on the fair present value of its property; that the Commission by its order in Case No. 2337 (9 Mo. P. S. C. R. 145) effective April 10, 1920, established rates for said company which were estimated to produce a gross revenue of approximately forty-two thousand dollars, being \$12,000 in excess of annual operating expenses as estimated by the Commission; that the Commission further increased the rates of said company by its order in Case No. 4638, entered on the 13th day of February, 1926.

The application further states that the above rates and estimates were based on a tentative value of the company's property for rate-making purposes of \$200,000; that said value is far less than the fair present value of said property; that the company has not during any of the years since the aforesaid rates were made effective, received as much gross revenue as \$42,000; that the fair present value of the company's property is not less than \$375,000; and that said company is not earning in excess of two per cent per annum as a rate of return upon the fair present value of its property used and useful in rendering utility service to the public.

Hearing in this case was held before members of the Commission at its hearing room in Jefferson City on the 16th and 17th days of November, 1927, at which time appraisals and testimony in support of the application were introduced by the company and testimony offered by the city of Lexington, Missouri.

P.U.R.1928E.

The testimony further shows that it was desirable and agreeable to all interested parties that the Commission direct its engineering and accounting departments to make an appraisal of the company's physical property and an audit of the books and records of the said company. Accordingly, and on the 19th day of November, 1927, the Commission issued its order directing its engineering and accounting departments to make said appraisal and said audit.

Subsequently said appraisal and said audit were completed and further hearing was held in this case before a member of the Commission at its hearing room in Jefferson City on the 15th day of August, 1928. Briefs were submitted by counsel for the company and for the bondholders.

History.

The Lexington Water Company was incorporated June 16, 1884, under the laws of Missouri, with total authorized capital stock of \$100,000, divided into 1,000 shares of par value \$100 each. The original stock subscription shows that James A. Jones of Wichita, Kansas, subscribed to 993 shares, the remaining 7 shares being taken by 7 residents of Lexington, Missouri.

Construction of the waterworks plant was commenced in the year 1884 and has since its completion been continuously rendering service to the city of Lexington and vicinity.

In the year 1903, Gustav Haerle of Lexington, Missouri, purchased a majority of the company's outstanding capital stock and assumed management of the property. Mr. Haerle continued as president and manager until his death in December, 1918, and at that time owned or controlled substantially all of the common stock and \$100,000 of bonds of the company.

The company for many years and until the time of Commission's order in Case No. 2337, *supra*, furnished water almost wholly on a flat rate basis and at a schedule of rates fixed by city franchise granted in 1903. The record shows the schedule of flat rates produced an insufficient income and the company had at the death of Mr. Haerle become so involved financially that its affairs were placed in the hands of a creditors' P.U.R.1928E.

and bondholders' committee. Said committee in an endeavor to place the affairs of the company on a sound financial basis instituted the proceeding in Case No. 2337, *supra*, in which the Commission ordered the company to install a metered system of water service and place certain rates in effect.

During the summer of 1923, a new franchise was obtained from the city of Lexington effective for a period of twenty years.

The minutes of a directors' meeting held on August 11, 1927, show that H. C. Spiller & Company, Inc., of Boston, Massachusetts, had at that date acquired 977 shares of the 1000 shares of capital stock, and all of the outstanding second mortgage bonds except \$280 thereof, of the company.

The securities of the company now outstanding consist of the following:

Capital Stock:

\$100,000 par value of capital stock divided into 1000 shares of par value \$100 each.

First Mortgage Bonds:

\$138,000 par value of first mortgage 6-per cent gold bonds dated January 1, 1924, due January 1, 1934.

Second Mortgage Bonds:

\$55,516 par value of second mortgage 6-per cent gold bonds dated January 1, 1924, due January 1, 1934. The interest to be compounded and paid at maturity date. The accrued interest to December 31, 1927 amounts to \$14,571.68.

The operating results of the company for the year ended December 31, 1927, are as follows:

Operating revenues	\$36,713.07
Operating expenses exclusive of depreciation	<u>23,231.35</u>
Net revenue available for depreciation and return	\$13,481.72
Nonoperating income (Interest)	12.00
Gross income	\$13,493.72
Deductions from gross income (Interest)	<u>12,978.77</u>
Net profit for year, exclusive of depreciation	\$514.95
P.U.R.1928E.	

The controversy herein relates principally to the value of the company's land, the accrued depreciation in the company's distribution mains, and whether the value of the railroad spur serving the company's pumping plant and a portion of the value of the water main serving the Missouri Pacific Railroad Company at Myrick, Missouri, should be included as property used and useful to the water company. These matters are discussed hereinafter in detail.

A general statement of the claims made by the company and the result of the appraisal made by the Commission's engineers is as follows:

	Investment Cost.	Reproduction Cost.	Reproduction Cost Less Depreciation.
Burns & McDonnell Engineering Company	\$446,533	\$342,898	
Burgess & Niple, Engineers ...	447,420	355,117	
Commission's engineers	\$238,934	407,508	275,216

Commission engineers made no estimate of going value and for comparative purposes it is excluded from the two totals of the Company's engineers.

Investment cost of the property could not be obtained by the accountants for the reason that some of the books and records of the company are not available. The company did not prepare an investment cost appraisal.

The reproduction cost estimates made by the Commission's engineers are as of date December 31, 1927. The reproduction cost estimates of Burgess & Niple and Burns & McDonnell are as of date July 15, 1927.

A comparison of the reproduction cost estimates covering the entire property is as follows:

P.U.R.1928E.

	Commission Engineers.	Burns & McDonnell.	Burgess & Niple.
Land devoted to operation	\$4,305	\$7,565	\$10,307
Right of way	35	.....	.....
Structures devoted to operation ..	34,310	38,040	34,001
Intake and suction mains	3,079	3,450	3,500
Settling, coagulating and clear water basins	45,665	43,791	45,316
Chemical treating plant	563	2,100	1,750
Boiler plant equipment	18,938	12,400	13,700
Pumps	37,510	33,425	36,930
Water and yard piping .....	.....	11,994	10,633
Miscellaneous station equipment...	2,518	2,950	2,500
Standpipes	15,286	14,325	16,400
Distribution mains	157,769	179,314	176,456
Services	1,205	.....	.....
Meters and meter boxes	20,252	22,461	23,284
Fire hydrants	7,034	5,372	5,380
General equipment	3,796	3,624	2,325
Material and supplies	5,925	5,100	5,000
Cash working capital	2,000	3,500	3,700
Subtotal	\$360,190	\$389,411	\$391,182
Construction overhead costs	47,318	57,122	56,238
Subtotal	\$407,508	\$446,533	\$447,420
Going value .....	.....	40,000	35,000
Grand total	\$407,508	\$486,533	\$482,420

Commission's engineers included water and yard piping with the boiler and pump equipment.

By referring to the above table of comparison it will be noted that the three independent appraisals are usually close for all physical elements of property. If the items of land, distribution mains and working capital be deducted, the foregoing sub-total before applying overheads, is changed as follows:

	Commission Engineers.	Burns & McDonnell.	Burgess & Niple.
Sub-total	\$360,190	\$389,411	\$391,182
Deduction as indicated	164,109	190,379	190,463
Comparison of all items of physical property except as noted	\$196,081	\$199,032	\$200,719

A comparison of the cost of reproduction less accrued depreciation estimates is as follows:

P.U.R.1928E.

	Commission Engineers.	Burns & McDonnell.	Burgess & Niple.
Land	\$4,305	\$7,565	\$10,307
Right of way	35	.....	.....
Structures	24,428	27,139	27,011
Intake and suction mains	2,343	1,980	2,000
Basins	36,583	37,343	41,766
Chemical treating plant	366	1,470	1,550
Boiler plant	11,496	9,105	12,430
Pumps	21,327	24,398	27,112
Water and yard piping .....	.....	9,596	8,507
Miscellaneous station equipment	1,717	2,065	1,870
Standpipes	8,866	11,460	13,120
Distribution mains	99,426	135,011	128,054
Services	747	.....	.....
Meter and meter boxes	16,606	17,165	21,325
Fire hydrants	4,823	4,029	4,842
General equipment	2,743	2,368	2,325
Materials and supplies	5,925	5,100	5,000
Cash working capital	2,000	3,500	3,700
Sub-total	\$243,736	\$299,294	\$310,919
Construction overhead costs	31,480	43,604	44,198
Sub-total	\$275,216	\$342,898	\$355,117
Going value .....	.....	40,000	35,000
Grand total	\$275,216	\$382,898	\$390,117

As in the reproduction cost appraisals the large difference in amount of reproduction cost less accrued depreciation is in the item of distribution mains although the company's engineers found considerably less accrued depreciation in the items of structures, boilers, pumps, and standpipe than the Commission's engineers.

The Commission's engineers found the annual depreciation requirements of the company to be the sum of \$4,287, or approximately 1.9 per cent of the investment cost of the depreciable property.

The company's engineers made no detailed estimate of annual depreciation requirement but the company claims an amount equal to 1½ per cent of the fair present value of the depreciable property.

Land.

The land of the company consists of nine separate parcels and the company's engineers used an appraisal made by two real estate dealers of Lexington for the company.

Mr. Burgess of the engineering firm of Burgess & Niple, added an additional amount of \$2,742 to the company's ap-

P.U.R.1928E.

praisal for improvements to the tracts on the assumption that the real estate appraisers had appraised only the bare land exclusive of paving, sidewalks, sewers, and other lot improvements.

The Commission's engineers obtained opinions from four citizens of Lexington who are realtors or are connected with and have knowledge of real estate transactions in the city.

The following are the conclusions of the company and Commission's engineers together with testimony opinions offered:

Parcel No.	Mr. Hopkins.	Mayor of Lexington.	Company.	Commission Engineers.
1	\$1800-\$2600	\$500	\$2000	\$1100
2		300	300	275
3		000	990	360
4	2000-2500	000	1200	1330
5			225	75
6			{ 450	35
7			150	190
8			2250	115
9	2000	200		825
Total			\$7565	\$4305

The controversy herein relates to parcels Nos. 1 and 9. Parcel No. 1 is the site of the company's standpipe and is a parcel of 2.5 acres fronting 272.7 feet on Wood street by an approximate depth of 398.6 feet.

The Commission's engineer obtained four opinions as to the value of parcel No. 1. These opinions were \$250, \$500, \$1,000, and \$1,200. In addition to said opinions it was ascertained a 50-foot corner lot nearby with sidewalks two sides and in a block of property improved with homes had been sold some two years prior for the sum of \$350. Using this as a basis the Commission's engineers and one of the real estate men giving an opinion, had assumed the parcel should be divided into eight lots and to these comparable values were assigned the total of which amounts to \$1,000. The Commission's engineers disregarded the two lowest opinions and used an average of the two other opinions in arriving at the value placed on this tract.

Mr. Minor, mayor of Lexington and a member of the board of equalization testified that in his opinion parcel No. 1 has a fair market value of \$500.

P.U.R.1928E.

Mr. Hopkins, president of a Lexington bank and president of the Lexington Building & Loan testified that in his opinion parcel No. 1 has a fair market value of \$1800 to \$2200.

Mr. Hopkins also testified that he is a member of the board of directors of the Lexington Water Company and that the bank of which he is president holds some of the bonds of the company.

The Commission's engineers obtained opinions from the same four real estate men as to the value of Parcel No. 9. These opinions were \$700, \$800, \$800, and \$1,000 based on acreage values.

Parcel No. 9 contains approximately twenty acres of tillable land adjoining the river and is subject to the action of the water and to overflow.

Mr. Minor testified that the city of Lexington had sold the water company some of this land about thirteen years ago at the rate of \$10 per acre, and that it was his opinion that the tract has no greater value than \$10 per acre at the present time.

Mr. Hopkins testified that in his opinion parcel No. 9 has a fair market value of \$2,000.

Structures.

The company's engineers have included in the property of the company a railroad spur serving the pumping plant. The reproduction cost of this spur is estimated by Burns & McDonnell to be \$1200 and depreciated \$120.

The Commission's engineers excluded this spur track for the reason that a contract between the railroad company and the water company provides that the entire expense of constructing said track, amounting to approximately five hundred and thirty-five dollars was to be borne by the water company; that the railroad company was to refund \$296 of said amount over a period of two years; and that the title to said track, the roadbed and all appurtenances, shall at all times be and remain in the railroad company.

The company claims this item is essential to the conduct of its business; that it could not be obtained without payment; and that it is used and useful property which should be included in the rate base.

P.U.R.1928E.

Distribution Mains.

The reproduction cost of distribution mains constitutes the major difference between the appraisals of the company's and Commission's engineers. Their estimate of cost is as follows:

Burns & McDonnell	\$179,314
Burgess & Niple	176,456
Commission's engineers	157,769

One item of difference between the company's and Commission's engineers lies in the exclusion by the latter of a 4 inch cast iron pipe line extending 3202 feet to Myrick, Missouri, and serving the Missouri Pacific Railroad Company. The Commission's engineers found a contract between the railroad company and the water company in which it is stated that the railroad company should furnish the pipe and the water company should lay same, and that the title to said pipe line should at all times be vested in the railroad company.

The company contends said line is used and useful and that the cost of installation in the approximate amount of \$1,500 should be included in the appraisal.

To make said appraisals comparable, the sum of \$4640 should be deducted from the Burns & McDonnell appraisal and \$4435 should be deducted from the Burgess & Niple appraisal for this item.

The company's appraisals are made as of date July 15, 1927, and the Commission's engineers' approval is of date December 31, 1927. Cast iron pipe prices between said dates dropped \$8.50 per ton which accounts for a difference in the appraisals of Burns & McDonnell and the Commission's engineers of approximately one thousand and fifty dollars.

The remaining and large difference between the reproduction cost appraisals of the company and Commission's engineers is primarily in the inventory of the spiral riveted pipe in the distribution system.

The Commission's engineers spent a number of months in making their appraisal. Every available record of the company was examined in detail and all possible information obtained from employees, former employees, and citizens of the city.

P.U.R.1928E.

The Commission's engineers found the distribution system consists primarily of spiral riveted pipe manufactured by two different firms and that very conclusive evidence is available in the records of not only the amount furnished by each manufacturer but also the class of pipe. Since the classes of said pipe vary considerably in weight and price the Commission's engineers considered these distinctions. The company's engineers made no examination of these records and merely grouped all spiral riveted pipe under the two headings of black and galvanized.

Spiral pipe in this system is known as "Root" and "Taylor" and quotations and units used by Burgess & Niple and the Commission's engineers indicate cost of 4-inch Root spiral riveted pipe f. o. b. Lexington, is 20 cents per foot more than the Taylor spiral riveted pipe.

Burgess & Niple state that their spiral riveted pipe units are based on the average cost of Root and Taylor pipe. The appraisal of the Commission's engineers shows there is no 4-inch Root pipe in the system. There is, therefore, approximately fifty-six hundred dollars difference in the appraisals for 4-inch spiral riveted pipe.

The Burns & McDonnell unit costs for a spiral riveted pipe in place are in very close agreement with the units as used by Burgess & Niple.

The inventory of galvanized steel mains as determined by the Commission's engineers is very different from that used by the company's engineers. The Commission's engineers found no 3½-inch mains and also found a considerable amount of ¾-inch, 1-inch and 1½-inch sizes that are included by the company engineers at 2-inch and 3-inch and, therefore, the latter carry a much higher unit cost.

Cash Working Capital.

The Commission's engineers estimated \$2,000 as the necessary amount of cash working capital needed by the company to pay its operating expenses between the time that said expenses are incurred and the time that revenue is received to reimburse them and has been taken as equal to one month's expenses.

P.U.R.1928E.

The company claims the cash working capital needed by the company is at least 1½-month's operating expenses.

Bills are payable the first of each month with 10 per cent penalty added if unpaid ten days after same are due.

Going Value.

Burns & McDonnell include \$40,000 in their appraisal for going value, and Mr. Baldwin of said firm testified that this amount is approximately 12 per cent of their depreciated reproduction cost and is the average of a number of court decisions where going value was allowed.

Mr. Burgess of Burgess & Niple, engineers includes \$35,000 in their appraisal for going value and testified that this amount is approximately 10 per cent of their depreciated reproduction cost and is the average of a number of court decisions.

Accrued Depreciation.

The Commission's engineers found the property as a whole in approximately 68 per cent condition; Burns & McDonnell found 77 per cent, and Burgess & Niple found 80 per cent.

The greater portion of these differences is found in the depreciation of the distribution mains of the company although there is some difference in practically all items.

The methods pursued in each instance are identical. All engineers made an inspection of the property; investigated the past history; determined as nearly as possible the age; and with these facts, made an assumption in most cases of the probable future life, and determined the per cent condition by the application of the rates of age to life. The differences for the most part are on the assumption of probable life and the weighted average age of items.

The major differences in per cent condition as found by Burns & McDonnell Engineers and Commission's engineers is shown in the following comparison:

	Burns & McDonnell.	Commission Engineers.
Boilers	73%	61%
Pumps	73%	51%
Standpipe	80%	58%
Distribution mains	75%	63%
P.U.R.1928E.		

Boiler Plant Equipment.

The Commission's engineers found the two boilers of the company have been in use fourteen years and assigned a life of 33- $\frac{1}{2}$ years to same. This assumption is based on the fact that the original boilers of the company were replaced due to being worn out at the end of twenty-nine years, and the further opinion that the entire present pumping system is probably obsolete and should be replaced by a more economical electrical pumping plant.

The Commission's engineers found that the brick stack was constructed by Mr. Haerle in 1903. Burns & McDonnell, engineers, have based their condition per cent on the assumption that said stack was built in 1913. Both engineers have assumed a life of approximately seventy-five years.

Pumps.

There are four pumps of the company doing low and high pressure service.

Burns & McDonnell, engineers, have found said pumps in an average condition of 73 per cent. The weighted average as determined from the reproduction cost and date of installations used by Burns & McDonnell is twenty-two and three tenths years. Said engineers, therefore, depreciated said pumps an average of 1.21 per cent per year which indicates they used an average assumed life of eighty-three years.

Mr. Baldwin of said firm testified that ordinarily fifty years is the life of these types of pumps.

Two of said pumps have been in service forty-three years and are no longer manufactured.

Mr. Burgess testified that in building a plant today he would buy a much lighter pump and for less money than these oldest pumps.

A Corliss type pump built by the Platt Iron Works in 1914 represents two-thirds of the total costs in this account.

Mr. Baldwin testified that the Corliss pump is a modern pump of high efficiency.

A letter attached to Commission's Exhibit No. 9 from the Platt Iron Works states that they no longer make this type of pump.

P.U.R.1928E. .

The Commission's engineers based their estimate of the condition of said pumps on the basis of not more than twenty years of future life. The twenty years of future life is based on the belief that modern electrical pumping would save a large yearly amount in operating expenses and that said present pumping units are, therefore, obsolete to some extent at this time.

Standpipe.

The standpipe of the company is forty-two years old. It is well preserved and well maintained. Commission's engineers assigned an assumed life of one hundred years to this item of property.

Mr. Baldwin testified that in his opinion this standpipe will remain standing if not destroyed by some outward or external force, possibly another fifty years.

Burns & McDonnell depreciated the standpipe 20 per cent or slightly less than .5 per cent per year which would give a total life of approximately two hundred years.

Distribution Mains.

The depreciation of the distribution mains of the company is the subject of the greatest differences in the depreciated costs of the company and Commission engineers.

Burns & McDonnell have as shown by the testimony of Mr. Baldwin, used an assumed life of one hundred years for all classes of pipe in the system.

The system consists of cast iron pipe, spiral riveted pipe that is black, galvanized, galvanized and asphalt covered, black and asphalt covered, of # 12, 14, 16, and 18 gauge metal, galvanized steel mains $\frac{3}{4}$ inch to 3 inches diameter and galvanized wrought iron mains 1 inch to 6 inches diameter.

The Commission's engineers placed an assumed life on mains on the basis of the character of the material from which they are made and modified by their inspection.

Both the company and Commission engineers opened the trenches in numerous places and inspected the exterior of the mains in such places. There is also a considerable quantity of spiral riveted pipe recently removed from the system that is available for inspection.

P.U.R.1928E.

The testimony shows that the soil at Lexington is what is geologically known as "Loess", and that said soil is peculiar in that metals buried in it do not oxidize or rust so quickly as in any other soil.

The assumed life of mains as used by the Commission's engineers is as follows: Cast iron pipe two hundred years; Root spiral riveted pipe 75 years; Taylor spiral riveted pipe fifty and sixty years depending on whether black or galvanized; ordinary galvanized steel pipe forty years; galvanized wrought iron pipe fifty years.

The evidence shows that all pipe regardless of age is in a very good state of preservation and very little apparent depreciation is observable.

Spiral riveted pipe which constitutes practically all of the pipe in the distribution system is very seldom used underground or in distribution systems such as is found at Lexington. Mr. Baldwin testifying as to the assumed life of spiral riveted pipe mentioned this fact, and that there was very little information that could be used as a guide in the determination of an assumed life. Mr. Baldwin further stated that in his opinion the spiral riveted pipe would last as long as cast iron pipe.

Annual Depreciation Requirement.

The company claims the annual depreciation requirement should be $1\frac{1}{2}$ per cent of the fair present value of the property.

Mr. Baldwin testified that the amount estimated in the Burns & McDonnell appraisal is $1\frac{1}{2}$ per cent of the estimated reproduction cost less depreciation and is only an approximation since the correct assumption should be on the basis of original cost of the property.

The Commission's engineers prepared an appraisal on the basis of investment cost and by applying the assumed lives of the various items of property as found by them, obtained an annual depreciation requirement of \$4,287.

Franchise Costs.

The testimony shows and is supported by the findings of the Commission's accountants that in 1923 the company expended the amount of \$707.80 in obtaining a new franchise.

Rate Case Expense.

The company was given permission to introduce and on August 29, 1928, filed with the Commission, a certified statement of expenditures made in connection with this case. The amount of such expense is \$10,907.26.

Rates.

The present rates for water service and the schedule of rates proposed by the company are as follows:

	First	10,000 gal. per month	Present		Proposed	
			Inside City.	Outside City.	Inside City.	Outside City.
Next	90,000	" " "	\$40	.50	.75	.90
Next	100,000	" " "			.65	.75
Next	100,000	" " "	.35	.45	.60	.65
Next	100,000	" " "	.30	.35		
Next	300,000	" " "			.50	.55
Next	500,000	" " "	.20	.25	.25	.30
Next	500,000	" " "			.15	.20
Next	1,000,000	" " "	.15	.20		
All over	1,500,000 gal. per month .....				.10	.15
All over	1,710,000 gal. per month .....		.15	.15		

Service Charge.

	Present.	Proposed.
½" meter per month	\$60	\$1.00
¾" " " " .....	.90	1.50
1" " " "	1.25	2.00
1½" " " "	2.50	4.00
2" " " "	4.00	7.00
3" " " "	7.50	12.50
4" " " "	10.00	17.50

Present minimum monthly bill \$1.

City is now furnished all water without cost, except a rental charge for fire hydrants at \$65 each per annum is made.

Proposed fire protection and city rates:

City—Lump sum of \$8,000 annually.

Additional hydrant rental per annum \$25 each.

*Conclusions.**Original Cost of Physical Property Exclusive of Land.*

The Commission's engineers offered the only evidence relative to the original cost of the physical property of the Lexington Water Company. The estimated cost as found by said engineers and including material and supplies, but excluding land and right-of-way is the sum of \$232,594.

The company has maintained that inasmuch as the books and records of the company are very incomplete, an original cost appraisal is too speculative and should not be considered P.U.R.1928E.

to any extent in the determination of a fair present value of the property.

Major Towles, Commission's engineer who made the appraisal for the Commission, testified at length as to the percentage of record costs and estimated costs used in the original cost appraisal and stated that in his opinion the original cost appraisal more accurately reflected such costs than the reproduction cost appraisal reflects present costs for the reason that a very considerable part of the original cost appraisal is based on the actual figures while all of the reproduction cost is a purely engineering estimate. An allowance for omissions and contingencies is also allowed in the original cost appraisal and applied to all of the physical property except land, even though a part of such costs are known and there is no necessity for such allowance.

[1] The Commission is of the belief that the original cost of property should be included in its considerations affecting fair value and rates and the evidence clearly shows the Commission's engineers were very painstaking and thorough in their determination of such costs.

[2] The Commission also believes that capital expended in items of property such as the railroad track serving this company's plant and the distribution main serving the railroad company at Myrick, Missouri, although not owned by the water company, should be included in the cost of the property until such time as they are removed and abandoned. The total original cost to the company of these items is estimated at \$1,450.

In view of the above and after full consideration of all the evidence herein, the Commission is of the opinion that the original cost of used and useful physical property of the Lexington Water Company, exclusive of land and working capital and inclusive of omissions and contingencies, construction overhead costs and material and supplies as of date December 31, 1927, is the sum of \$234,044.

Reproduction Cost of Physical Property Exclusive of Land.

The testimony relating to the reproduction cost of the physical property shows that practically all of the differences be-

P.U.R.1928E.

tween the company's appraisals and the appraisal presented by the Commission's engineers are caused by the differences in inventory and the study of the property.

Two or more of the Commission's engineers spent approximately seven months in the preparation of their appraisals and studies. The testimony indicates that every possible fact relative to the inventory and cost of said property was obtained; that the records reveal quite a large difference in the inventories of the company's and Commission's engineers, especially in the items of distribution mains; that the company's engineers based their estimates of reproduction costs in great part, on costs of work in similar plants; and that the Commission's engineers used costs as determined from the records of the company, from local contractors and from records of other utilities in the city of Lexington.

Mr. Baldwin, of the firm of Burns & McDonnell, engineers, and the only witness to testify on the appraisal of said company, stated that he had not prepared said appraisal. His testimony further indicates he had no connection with said appraisal until after same had been completed when he had made several trips to Lexington for the purpose of depreciation studies.

The Commission is of the opinion that Mr. Baldwin is poorly qualified to testify as to the appraisal made by his firm.

Mr. Burgess testified that he prepared the appraisal for his firm; that the inventory made by the firm of Burns & McDonnell was accepted by him; and that he had spent six days on the property of the company.

In view of the above the Commission is of the opinion that the appraisal made by its engineers more nearly reflects the true inventory and reproduction cost of the physical property.

The Commission will include the sum of \$1,450 expended by the company on the used but not owned railroad spur and the water main serving the railroad company at Myrick, Missouri.

The Commission, therefore, finds after full consideration of all the evidence herein that the reproduction cost of used and useful physical property of the Lexington Water Company, exclusive of land and working capital and inclusive of omis-P.U.R.1928E.

sions and contingencies, construction overhead costs and material and supplies as of date December 31, 1927, is the sum of \$402,618.

Accrued Depreciation of Property.

A large proportion of the reproduction cost of this property is in its distribution mains, and due to the rather unusual fact that spiral riveted pipe has been used almost wholly in this system of mains, and that this class of pipe is very seldom used for underground distribution, the engineers have introduced a large amount of speculation as to the probable life of spiral riveted pipe and of other kinds of pipe.

Burns & McDonnell, engineers, have arbitrarily assumed that all classes and kinds of pipe in this system will remain in service the same length of time, viz., one hundred years. Burgess & Nippe, engineers, assumed cast iron pipe will remain in service two hundred years and all other pipe remain in service one hundred years. The Commission's engineers assumed cast iron pipe will remain in service two hundred years and that other pipe in the system will have lives dependent on its physical construction.

[3] Some of the distribution mains are as small as $\frac{3}{4}$ -inch galvanized iron pipe; the spiral riveted pipe is of varying thicknesses, some of said pipe is black pipe and some is galvanized, and all are very thin as compared with cast iron pipe. It, therefore, seems highly illogical that if assumptions of probable future life were necessary, that all of the pipe in this system should be classed the same and given the same expected life or that the smaller galvanized pipe should carry the same expected life as the larger and heavier galvanized pipe.

If the assumption of the Burns & McDonnell, engineers, is correct and cast iron pipe will continue in use for one hundred years in this property then their assumptions for other kinds of pipe are in the opinion of the Commission radically incorrect.

The evidence while showing the Commission's engineers made a more careful study before selecting an expected life for pipe, indicates that somewhere between fifty and one hundred years is the proper expected life of spiral riveted pipe in this system.
P.U.R.1928E.

The Commission in view of all the evidence is, therefore, of the opinion that the appraisal of its engineers may not correctly reflect the cost of reproduction less accrued depreciation of distribution mains and that their estimate of this item should be increased in the amount of \$8500.

Differences exist in the amount of accrued depreciation in the boiler plant and pumping equipment as determined by the company's and Commission's engineers. Some of this difference is due to the incorrect date of installation placed by the company's engineers on some of this property. The remaining difference is due to the differences in expected life.

[4] The Commission's engineers investigated operating conditions at the plant and prepared an estimate which shows that electrical pumping equipment can be installed which would save a considerable sum now spent in operating the pumping plant.

Without going into the details of this investigation the Commission is of the opinion that the water company has been financially handicapped in the past and it would probably be best to allow the present management to make a full and detailed investigation of electrical pumping before seriously considering the same. However, the investigation shows there can in all probability be a saving by such an installation and this fact should be reflected in the probable life of the steam pumping equipment.

Apparent obsolescence is present in the pumps. They are no longer manufactured and one of the company's engineers testified he would purchase pumps for a less amount than the amount used in his appraisal if he was actually constructing this plant.

The Commission is of the opinion that its engineers have given proper consideration to the accrued depreciation in boiler plant and pumping equipment.

The Commission will adopt the amount found by its engineers for the cost of reproduction less depreciation of the company's standpipe. The testimony submitted by the company is very inconsistent with its appraisals in this respect.

In view of the above and after full consideration of all the
P.U.R.1928E.

evidence herein, the Commission is of the opinion that the cost of reproduction less accrued depreciation of the used and useful physical property of the Lexington Water Company, exclusive of land and working capital and inclusive of omissions and contingencies, construction overhead costs and material and supplies as of date December 31, 1927, is the sum of \$278,500.

Land.

The fair market value of land as shown in the company's and Commission's engineers' appraisals is based on opinions.

The company secured a real estate operator and a lawyer of Lexington to appraise their lands.

The Commission's engineers obtained opinions from the present assessor, a former assessor and real estate trader, an officer in a Trust Company, property owner and trader, and a real estate agent.

The parcel of land along the river is subject to overflows each year and the rental received for this parcel indicates that it is not very desirable as farming land.

If the standpipe parcel is based on the recent sale of the corner lot in front of said parcel, and consideration given of a portion of the parcel being very steep hillside land with a ravine running through same, it appears to the Commission that said parcel when divided into lots would not be nearly so valuable as the said lot which has been recently sold.

The opinions obtained by the Commission's engineers indicate that two of the men considered this parcel as grazing or pasture land and priced it on an acreage basis.

The facts do not justify a value as claimed by the company and the Commission will adopt the fair market value of the company's land as found by the Commission's engineers.

[5] The company should be allowed to capitalize and earn on any expenditure actually made in obtaining its franchise and this Commission will include such expense in the fair present value of the property.

The company should be allowed a cash working capital sufficient to meet its obligations promptly and have something for P.U.R.1928E.

emergencies. The revenues of the company are due monthly with a penalty if not paid within ten days from date due. The Commission will allow the sum of \$3,000 for cash working capital.

The Commission must make some allowance for going value or the fact that this company is operating and has its business attached.

[6] The Commission does not believe that because this Commission or any Commission has allowed a certain amount for going value in a case or in a group of cases, that it reflects in any way the going value in this case.

Going value is a matter of judgment based on all the facts in each particular case.

The Lexington Water Company has for many years enjoyed a monopoly in the city of Lexington and vicinity. It also has for many years been in financial difficulties, and this in spite of relief given by the Commission whenever brought to its attention.

The Commission is of the opinion that the sum of \$15,000 is a fair allowance for going value in this case.

Fair Present Value.

The courts have never handed down a definite rule for the determination of fair present value of a property but from time to time have designated certain factors that must be considered, viz.: original cost, reproduction cost, reproduction cost less accrued depreciation, reasonable judgment having its basis in a proper consideration of all relevant facts, and consideration of future conditions and costs.

Summarizing our specific findings upon the various elements of the company's property, we have the following as of date December 31, 1927:

Original cost of used and useful physical property, except land . . .	\$234,044
Cost of reproduction of used and useful physical property, except land . . .	402,618
Cost of reproduction of used and useful physical property, except land, less accrued depreciation . . .	278,500
Market value of land and right-of-way . . .	4,340
Cash working capital . . .	3,000
Going value . . .	15,000

[7] In view of the foregoing and after a careful consideration
P.U.R.1928E.

tion of all the evidence and relevant facts herein, we find the fair present value of the used and useful property of the Lexington Water Company including all elements of value, tangible and intangible, as of December 31, 1927, to be the sum of \$285,000.

Annual Depreciation Requirement.

The Commission is of the opinion that the company should be allowed to earn the sum of \$4,500 each year to provide a fund for the retirement of its physical property.

Rates, Revenues and Expenses.

Commission's Exhibit No. 1 shows the company had the sum of \$13,493.72 net revenue available for depreciation and return for the year ended December 31, 1927. The Commission is of the opinion that this amount is inadequate and that the company's net revenue available for depreciation and return should be increased. The company also should be allowed to amortize the costs of this rate case over a period of five years or in the amount of \$2,181.45 per year.

The fire hydrant rental in the city of Lexington is \$65 per year per hydrant. The Commission is of the opinion such a charge is adequate and just for such service in the city of Lexington.

[8] All water now furnished the city for use in its public buildings is free to the city. This is a very unsatisfactory manner of furnishing service and is a discrimination against other consumers. The city should purchase its water on a metered basis the same as any consumer.

[9] During the year 1927, the company sold 73,841,175 gallons of water at a combined production and distribution expense of \$14,795.62 or at the rate of 20 cents per thousand gallons. The company has six customers who purchased 45,770,790 gallons of the water sold and paid the sum of \$9,935.09 for same or at the rate of 21.7 cents per thousand gallons. The Commission is of the opinion that the margin of profit on this class of consumers scarcely pays its proportion of the general expenses and provides a fair profit.

[10] The production cost of water at Lexington is excessive
P.U.R.1928E.

when compared with the same costs in other cities similar to Lexington, and bears out the opinion of the Commission's engineers that the present pumping plant is obsolete; that the load factor is exceedingly low, and that other and less expensive methods of production should be inaugurated.

[11] Rates as proposed by the company which would produce an adequate return on the fair present value of the property as fixed herein would be considerably in excess of any other metered rates in effect within this state.

The company is justly entitled to an adequate return on the fair value of its property but it is also obligated to conduct its affairs in an efficient manner. The financial losses of the past owners and the design of the present pumping equipment are ample evidences of past inefficiency.

The Supreme Court of the United States has said:—

“What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it . . . than the services . . . are reasonably worth.” Smyth v. Ames, 169 U. S. 466, 547, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

In view of the above and all the facts herein, the Commission is of the opinion that the maximum rate for metered service inside the city of Lexington should be 60 cents per thousand gallons of water; that the maximum rate for metered service outside the city of Lexington should be 70 cents per thousand gallons of water; that the service charge should remain the same as now charged; and that a minimum bill as now charged should remain in effect.

An order will issue in accordance with the above.

Brown, Chairman, Ing, Calfee and Hutchison, Commissioners, concur; Porter, Commissioner, absent.

P.U.R.1928E.

MAINE PUBLIC UTILITIES COMMISSION.

RE ANDROSCOGGIN & KENNEBEC RAILWAY COMPANY.

[R. R. 1466.]

Service — Commission jurisdiction — Abandonment — Street railways.

1. A Commission may command the restoration of a utility service which has been voluntarily and unwarrantedly discontinued by a company still exercising its charter rights, p. 351.

Service — Burden of proof — Discontinuance — Street railways.

2. A transportation utility must prove by cogent evidence facts which justify any termination of its former service, which it may propose, p. 351.

Service — Discontinuance — Procedure — Street railways.

3. A utility seeking to discontinue service should be compelled to ask for permission before taking any action rather than place the burden of proof upon the public after such discontinuance to show cause why it should be restored, p. 351.

Service — Commission powers — Law violation.

4. The Commission is required to inquire into any neglect or violation of the state laws by any public utility including its duty to furnish safe, reasonable, and adequate facilities for public accommodation, p. 360.

Service — Discontinuance — Commission jurisdiction — Street railways.

5. The Commission has jurisdiction to require a railway utility to apply for consent and show cause why such consent should be given to any proposed discontinuance of a branch line, p. 360.

Service — Discontinuance — Inadequate revenue — Construction.

6. A railway company was permitted to abandon a portion of its line upon which the traffic and revenue had steadily decreased so as not to permit of a fair return, and where the company was faced with an immediate and expensive reconstruction program if safe operations were to continue, p. 362.

Service — Discontinuance — Commission powers — Municipal consent.

7. The Commission is not inhibited from granting its consent to the discontinuance of service on an interurban railway line passing through several municipalities by the fact that the local authorities have not yet granted consent to such discontinuance, where the company is operating under a permissive and not a mandatory charter, and where there was no evidence of contractual relationship between the company and such municipalities, and where the officers of the latter had notice of, and were present at the Commission hearing without protest to the proposed action, p. 365.

[September 14, 1928.]

P.U.R.1928E.

APPLICATION of a railway company for consent to abandon portion of its line; granted in accordance with opinion and order.

Appearances: Andrews, Nelson and Gardiner, and Hon. William B. Skelton, for petitioners; Hon. Ernest L. McLean, Mayor of Augusta, for city of Augusta; Hon. Herbert E. Foster, for town of Winthrop.

By the Commission: The petitioning corporation is the largest street railway system in the state operating $145\frac{8}{100}$ miles of main track; its longest main track running from the city of Waterville, in Kennebec county, to Lewiston and Auburn in Androscoggin county, thence to the town of Brunswick, from which it proceeds through Freeport to Yarmouth. A branch track connects Brunswick with Bath. The company operates local lines in Lewiston and Auburn; Lewiston to Lake Grove; Augusta to Togue; and Lewiston to Mechanic Falls.

The portion of its lines involved in this proceeding is a branch known locally as the Augusta-Winthrop Branch, fourteen miles in length, connecting the city of Augusta (the state capital), Manchester, East Winthrop, and Winthrop, all in Kennebec county.

The Androscoggin & Kennebec Railway Company is a consolidated system composed of numerous other formerly independent street railway companies, but its derivative rights relevant to the pending case come from its absorption of the Augusta, Winthrop & Gardiner Railway (organized as the Lewiston, Winthrop & Augusta Street Railway, July 13, 1900; whose name was changed January 13, 1902 to Augusta, Winthrop & Gardiner Railway).

The Augusta, Winthrop & Gardiner Railway was incorporated under the General Law. Its course was "from the junction of State street and Western avenue in the city of Augusta, in the county of Kennebec, through Augusta, Manchester, Winthrop, Monmouth, and Wales to the terminus of the Lewiston, Brunswick & Bath Street Railway in the town of Webster." Its location was approved by the Railroad Commissioners December 29, 1900.

Chapter 265, Private and Special Laws of 1901, authorized
P.U.R.1928E.

the Augusta, Hallowell & Gardiner Railroad Company to sell or lease its property and franchises to the Lewiston, Winthrop & Augusta Street Railway upon such terms as were mutually agreed upon by the stockholders of the respective companies. Such sale was consummated in the year 1902. We shall henceforth refer to the Lewiston, Winthrop & Augusta Street Railway by its later name, Augusta, Winthrop & Gardiner Railway.

By Chap. 54, Private and Special Laws of 1903, the Augusta, Winthrop & Gardiner Railway is authorized to lease or sell its property and franchises or any part thereof to any street railroad company whose lines as constructed or chartered would form connecting or continuous lines with the lines of the said Augusta, Winthrop & Gardiner Railway as constructed or chartered. It will not be helpful to our special inquiry further to trace the steps by which the petitioner's constitutive companies grew into the present great system. The Lewiston, Augusta & Waterville Street Railway (organized as Auburn, Mechanic Falls & Norway Street Railway in 1902) acquired the Augusta, Winthrop & Gardiner Railway in 1907.

The Lewiston, Augusta & Waterville Street Railway under foreclosure sale by decree of the supreme judicial court in 1918, having been bought by bondholders, was reorganized under the statute as the Androscoggin & Kennebec Railway Company, the petitioner.

Under the reorganization, the branch line to Winthrop from Augusta is operated as an integral part of the petitioner's present system, although originally an independent line functioning by its own franchise. The petition asks the consent of the Public Utilities Commission to abandon this branch and to dismantle the equipment, take up the tracks and sell the material. Have we authority to grant such consent?

Jurisdiction.

On more than one occasion, this Commission has been confronted by the question whether it has authority to consent to the abandonment of service by a public utility. *Re St. Croix Gaslight Co.* P.U.R.1919A, 487; *Re Coburn Steamboat Co.* P.U.R.1919C, 71; *Re Oxford Electric Co.* P.U.R.1920A, 852; P.U.R.1928E.

Re Cumberland County Power & Light Co. P.U.R.1928E, 300. In the case of a gas light company, the Commission took jurisdiction to prevent continued economic loss. Re St. Croix Gaslight Co. (*supra*).

In the absence of determinative opinion by the supreme judicial court of this state, it is necessary in the pending case for the Commission to make a ruling concerning its authority.

First, we find the petitioner to be a public utility actively operating a street railway, as defined in § 15 of Chap. 35 of the Revised Statutes, of which the Augusta-Winthrop branch line is an integral part.

For clearness of understanding, let it be known no complete abandonment of a public business is before us; the problem arises from the proposed abandonment of a branch line only, the remainder of the system continuing its functions.

Chapter 55 (Revised Statutes 1916) known as the Public Utilities Act, contains no simple and direct declaration of our authority to consent to abandonment.

Section 16 requires every public utility to furnish safe, reasonable and adequate facilities.

Section 43 ordains that: "Upon written complaint made against any public utility . . . that any . . . practice or act . . . is in any respect unreasonable, insufficient . . . or that any service is inadequate or cannot be obtained, the Commission, being satisfied that the petitioners are responsible and that a hearing is expedient, shall proceed . . . to make an investigation, . . ."

Section 46: ". . . If upon such public hearing, it shall be found that any . . . act or service complained of as . . . insufficient . . . or if it be found that any service is inadequate or that any reasonable service cannot be obtained, the Commission shall have power to establish and substitute . . . such other . . . service or acts, and to make such order . . . and such changes in such . . . service and acts as shall be just and reasonable."

In discussing whether the state, having retained the right to regulate rates, notwithstanding a contract establishing them, had vested such power in the Public Utilities Commission, the su-P.U.R.1928E.

preme judicial court, speaking by Mr. Chief Justice Wilson, in Re Searsport Water Co. 118 Me. 382, 392, 394, 396, P.U.R. 1920C, 347, 357, 360, 362, 108 Atl. 452, declared:

"The general purpose of legislation of this nature, which has been enacted in many of the states, is, we think, to place the entire regulation and control of all public service corporations (or individuals engaged in supplying a public utility) in the hands of a Board or Commission which can investigate conditions, hear parties, and grant relief much more expeditiously and fairly than the legislature itself."

"The Utilities Commission, a body specially clothed with all the authority of the state for the performance of an important governmental function,"

In respect of rates fixed by contract,—

"We, therefore, conclude from the general purpose of such legislation, and the broad and inclusive terms employed in Chap. 55 in conferring powers upon the Utilities Commission, and in the light of the judicial construction of similar acts by other courts of last resort, that the legislature intended to delegate to the Utilities Commission of this state as complete power over rates fixed by prior contracts that have been determined to be 'unjust and unreasonable' as the state itself then possessed."

[1-3] Applying these broad views to the service of a utility, one sees the purpose of the public utility law to be inclusive and definite in entrusting to the Commission the entire regulation and control of all public service corporations, in respect of service as well as rates. It is readily seen, upon reflection, there is little practical difference between the refusal to order an abandoned service restored, upon complaint and after public hearing, and the giving of consent, in advance, to the abandonment of the same service after such public hearing. If a utility voluntarily and unwarrantedly discontinues its service, while still exercising its charter rights, the Commission may command restoration of service after hearing, but the public complaining is deprived of its accustomed use of the utility's facilities, during at least twenty days which must intervene while statutory notices are given. The complaining public ordinarily has no dependable information concerning earnings and other controlling facts and P.U.R.1928E.

presents its complaint invariably without adequate preparation. Upon it rests a burden it is ill prepared to sustain. On the contrary, in a hearing for consent to abandon, upon the utility's petition the utility must prove by cogent evidence facts which justify the proposed final termination of its former service. The ultimate consequence to the public is the same where prior consent to abandonment is obtained after a public hearing, and where precedent voluntary abandonment by a utility is followed by hearing upon complaint and refusal to order service restored. The former procedure conduces to a complete and more exhaustive hearing. The utility having devoted its facilities to a public calling is allowed to abandon service only after showing motives for doing so. No hardship to it can be perceived by such requirement, while the public is relieved of a burden of proceeding, which rests upon the utility seeking the Commission's consent.

Courts of unassailable authority have expressed opinions sustaining the jurisdiction of State Commissions in cases similar to the case before us in language clear and logical.

In *Herpolsheimer Co. v. Lincoln Traction Co.* 96 Neb. 154, 158, 159, 147 N. W. 206, 1114, the authority of a State Railway Commission to consent to an abandonment of service by a street railway company was presented to the supreme court. The street railway company operating in Lincoln discontinued certain services, abandoning some parts of the line formerly owned and operated by it, and the plaintiff began action in the District Court to enjoin the defendant from ceasing to operate such lines and to compel restoration of service. The Constitution of 1906 provides:

"The powers and duties of such Commission shall include the regulation of rates, service and general control of common carriers as the legislature may provide by law. But, in the absence of specific legislation, the Commission shall exercise the powers and perform the duties enumerated in this provision."

The statutes enacted pursuant to its provisions are:

"The Commission shall have the power to regulate the rates and the services of, and to exercise a general control over all railroads, . . . and all other common carriers."

P.U.R.1928E.

In construing these provisions the court concludes:

"When such changes are made they should be made in the interest of the public generally, and the rights of the street railway company, the economy and efficiency of the service, and the interests of the citizens who property rights and convenience are especially affected, should all be considered. . . . There is no doubt that such matters are within the purview of the constitutional provision and the statute above quoted, which provide that the State Railway Commission shall have power to regulate the service and control common carriers of passengers. . . . The power to regulate rates of common carriers would be incomplete and comparatively useless without the corresponding power to regulate the service, and control the common carrier in performing such service, and these powers are expressly given to the State Railway Commission by the terms of the Constitution, and the statute enacted thereunder. It seems clear that these provisions prevent the defendant from making such changes in the service without first obtaining the authority of the State Railway Commission so to do."

In Herpolsheimer Co. v. Lincoln Traction Co. 97 Neb. 113, 149 N. W. 326, motion for rehearing was denied. See also State ex rel. Spillman v. Chicago & N. W. R. Co. 112 Neb. 176, 177, P.U.R.1924E, 607, 198 N. W. 670, where the court expresses the opinion that:

". . . the Railway Commission possessed jurisdiction to make such order . . .," for continuance of service:

". . . under the Constitution and statutes of the state, and that respondent must obtain the permission of the Railway Commission in order to discontinue the service, . . ."

In Phoenix R. Co. v. Lount, 21 Ariz. 289, 292, 295, 300, P.U.R.1920D, 186, 188-190, 195, 187 Pac. 933, the decision turned upon the following facts:

A street railway company occupying certain streets of Phoenix, along which it had conducted its railway service, ceased to operate its cars on a few of the streets and took up the track. Lount and other citizens petitioned for writ of mandamus to compel the railway company to continue operation. July 11, 1916—the Corporation Commission of the state authorized the P.U.R.1928E.

abandonment of a portion of a street railway company's lines. Upon appeal, the matter reached the supreme court, which thus states:

"The controversy involves the power of the Corporation Commission to make the orders relied upon by the appellant (street railway company) as justification of its action in making the changes; it being contended by appellant that the Commission had such power, and by appellees that it did not have such power and that, therefore, its orders were null and void."

The court then quotes several sections of the applicable statute, particularizing in respect of the following:

Paragraph 2289: "Every public service corporation shall furnish, provide, and maintain such service, instrumentalities, equipment, and facilities as shall promote the safety, health, comfort, and convenience of its patrons, employees, and the public, and as shall be in all respects adequate, efficient, just, and reasonable."

Paragraph 2307: "The Commission is hereby vested with power and jurisdiction to supervise and regulate every public service corporation in the state and to do all the things, whether herein specifically designated or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."

Paragraph 2312: "Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public service corporation . . . ought reasonably to be made, . . . the Commission shall make and serve an order directing that such additions, extensions, repairs, improvements, or changes be made. . . ."

The court then concludes:

"Viewing the above provisions of the statute and the Constitution as the only law upon the subject, it would seem that no other conclusion could be drawn than that the Corporation Commission was vested with the power to make the order of July 11, 1916, and that such order was ample authority for the abandonment." P.U.R.1928E.

ment of that portion of the Brill line of which complaint is made by the appellees."

"We conclude that the appellant, being a public service corporation, was subject to the jurisdiction, control, and regulation of the Corporation Commission, and that the order of July 11, 1916, permitting appellant to abandon its line on First and Pierce streets is within the letter and spirit of Paragraph 2312, Chap. 11, title 9." (*supra*)

In *State ex rel. Caster v. Kansas Postal Teleg.-Cable Co.* 96 Kan. 298, 303-307, P.U.R.1915E, 222, 229-233, 150 Pac. 544, the respondent telegraph company doing both interstate and intrastate business had maintained for several years a telegraph station at Syracuse, but finding that business was not profitable, closed its office at Syracuse and discontinued service. The state complained through the Attorney General that the company had omitted to ask and obtain from the Public Utilities Commission an order permitting the closing of its office and the abandonment of its business. The court in its opinion quotes from the statutes creating the Public Utilities Commission, which descend somewhat more into detail than the Maine statutes in respect of the powers of the Public Utilities Commission. This difference, however, is not such, in our opinion, as to make the Kansas decision inapplicable to the case before us. The court interprets the statute in a way that lodges in the Public Utilities Commission authority to consent to abandonment of service previously rendered, saying:

"It will be seen . . . that the legislature has promulgated a comprehensive program for the regulation and control of public service corporations."

". . . we find the Commission vested with full power, authority, and jurisdiction to supervise and control the public utilities and common carriers, and empowered to do all things necessary and convenient for the exercise of the power, authority, and jurisdiction. That is to say, whatever power is necessary to the effectual exercise of the specific powers conferred is likewise conferred . . . every common carrier and public utility is required to give reasonably efficient and sufficient service, and to make just and reasonable rules and regulations, and the Com-

mission is given power to require reasonably sufficient and efficient service to be maintained. . . .”

“In view of all these, can there be any doubt of the duty of the defendant, before dismantling its station at Syracuse and abandoning its business thereat, to secure the approval of the Commission for such an important change in its mode of service? How is the Public Utilities Commission to discharge its important duties if the public service companies may quit business here, there, or anywhere in the state without an opportunity for the Commission to determine the propriety of such a course? . . . Where would this end? If these utility corporations may abandon this particular service without consent of the Commission, may they not take off their passenger trains, take up and abandon unprofitable branch lines, . . . without the consent of the Commission? These questions answer themselves. To yield approval to the contention of the defendant is to concede that the state's program for the regulation and control of public service corporations is ineffective; that the Public Utilities Act has been enacted in vain.”

“Shall the public service company determine this matter itself, and without any governmental check of any sort? No argument can be made for the defendant on its right to close its Syracuse station without consent of the Commission which could not with equal force be made in favor of its right to make any other change in its methods of conducting its business in this state without consent of the authority vested by law with supervision of its business. . . .”

The court continues:

“. . . we insist that the first official tribunal to have consideration of such matters is the Public Utilities Commission.”

The court concludes that while the statute does not expressly authorize the Public Utilities Commission to consent to abandonment, nevertheless the purpose of the act includes authority to give such consent.

In *State ex rel. Public Service Commission v. Missouri Southern R. Co.* 279 Mo. 455, P.U.R.1919F, 575, 214 S. W. 381, the supreme court of Missouri addresses itself to the same problem.

P.U.R.1928E.

The likeness of phraseology existing in the Missouri and Maine statutes establishing the respective regulatory boards, indicates that both statutes had a common source in respect of many matters entrusted to the Commissions. The Missouri statute contains no explicit power for the Commission to consent for the state to abandonment of service.

The Missouri Public Service Commission Act was passed in 1913; § 27 of Article 2 (Page 570) ordains:

"Every corporation, person, or common carrier performing a service designated in the preceding section shall furnish, with respect thereto, such service and facilities as shall be safe and adequate and in all respects just and reasonable. . . ."

Section 47, Paragraph 2 (Page 585):

"Whenever the Commission shall be of the opinion, after a hearing had upon its own motion or upon complaint, that the regulations, practices, equipment, appliances or service of any such common carrier, railroad corporation, or street railroad corporation in respect to transportation of persons or property within this state are unjust, unreasonable, unsafe, improper, or inadequate, the Commission shall determine the just, reasonable, safe, adequate, and proper regulations, practices, equipment, appliances, and service thereafter to be in force. . . ."

In this case the Missouri Southern Railroad Company abandoned spur tracks without authority of the Public Service Commission. The state, acting through the Public Service Commission, instituted mandamus proceedings to compel restoration of service upon the grounds that the consent of the Commission was requisite before the service could be abandoned. Reasoning from the expanded powers of the Public Service Commission and the consequences resulting if utilities abandon service of their own volition, the court decides [P.U.R.1919F, 575, 582] that a utility cannot determine for itself the question of its right to abandon a line but must apply to the Public Service Commission for leave to abandon, saying:

"Can appellant (railroad company) abandon this service without applying to the Commission for leave to do so? If so, any carrier can abandon any service without such leave, and, doubtless, change fares and take off equipment, whenever it comes to P.U.R.1928E."

the conclusion that the facts justify such action. If this course be lawful, the Commission will become little more than a figure head so far as carriers are concerned, and its powers can be ignored or invoked as the carrier may desire. . . . It should have applied to the Commission for the leave. Unless the power of the Commission to pass on this question is conceded, then it is apparent the exercise of some of its express powers is conditioned upon the consent of the carrier. The express power of the Commission over facilities, equipment and construction and changes therein and over the operation of trains is of no avail if appellant's (railroad company) contention is sound."

In deciding affirmatively the question whether the State Corporation Commission had authority to consent to abandonment as a phase of regulation, the supreme court of appeal of Virginia said:

"The maintenance of street railway tracks as facilities which are necessary for the performance of public service by a street railway company is obvious. . . . It follows, therefore, that under the sovereign power of regulation, as the company may be required to establish and maintain such facilities, the state, under proper conditions and in order to avoid confiscation, may also decline to require their continuance and permit the abandonment. . . ." *Hampton v. Newport News & H. R. Gas & E. R. Co.* 144 Va. 29, 32, 131 S. E. 328.

The supreme court of Pennsylvania declares:

"A public service corporation cannot be compelled to continue indefinitely operations which will result in the exhaustion of its assets. . . . When the railway cannot be run except at a loss, the owners may withdraw from the enterprise, but this must be done in the way provided by law. If the company desires to surrender all of its powers and franchises, and cease its corporate existence, then the application is to be made under the provisions of the Act of 1856. If the intention is merely to reduce the field of activity, by abandoning certain territory which it otherwise would be compelled to supply, the determination of the question is for the Public Service Commission. . . . To it is committed the regulation of service, by which is meant the duty owed by the corporation to its patrons, employees, and the public, in P.U.R.1928E.

the performance of its charter obligations. . . . The change in extent of service is a matter for the Commission, and, after investigation, it can determine whether a portion of the line, unprofitable in itself, may, in the interest of the public, be abandoned or continued at a risk of loss of entire service, because of the drain on revenues by operation of the unproductive branch." *Norristown v. Reading Transit & Light Co.* 277 Pa. 459, 464, 121 Atl. 495. See also *People ex rel. Hubbard v. Colorado Title & Trust Co.* 65 Colo. 472, P.U.R.1919A, 542, 178 Pac. 6; *Northfield v. Public Utilities Commission*, 100 Ohio St. 424, P.U.R. 1920C, 925, 126 N. E. 311; *Helena v. Helena Light & R. Co.* 63 Mont. 108, P.U.R.1922E, 588, 207 Pac. 337.

The highest courts of a few states express opinions in irreconcilable conflict with the cases we have cited, but it will be seen upon examination that in some of these, additional factors are present influencing their conclusions; in others that the statutes of their respective states have not lodged power to consent to abandonment of service in the hands of the state regulatory Commissions, or that terms of utilities' charters would be unlawfully affected by the granting of such consent for abandonment.

See *Railroad Commission v. Macon R. & Light Co.* 151 Ga. 256, P.U.R.1921C, 540, 106 S. E. 282; *Rutland R. Light & P. Co. v. West Rutland*, 98 Vt. 385, P.U.R.1925C, 702, 127 Atl. 882; *Re Boston & M. R. Co.* 82 N. H. 116, P.U.R.1925E, 698, 129 Atl. 880.

The Commissions of many states assume jurisdiction in cases such as the one we now consider. In a few states statutes expressly confer such authority.

Sawyer v. Mays (Ark.) P.U.R.1920D, 793; *Re Fresno Interurban R. Co. (Cal.)* P.U.R.1919B, 684; *Re Idaho Power Co. (Idaho)* P.U.R.1922C, 705; *Re Boise Valley Traction Co. (Idaho)* P.U.R.1923A, 441; *Re Indianapolis Street R. Co. (Ind.)* P.U.R.1926D, 658; *Re Chicago, M. & St. P. R. Co. (Minn.)* P.U.R.1919B, 704; *Re Duluth & Northern M. R. Co. (Minn.)* P.U.R.1921B, 373; *Re Exeter, H. & A. Street R. Co. (N. H.)* P.U.R.1919B, 251; *Re Exeter, H. & A. Street R. Co. (N. H.)* P.U.R.1927C, 136; (Not applicable to steam railroads *Re Boston & M. R. Co. supra*); *Dunwell v. Fried Co. (N. D.)* P.U.R.1928E.

P.U.R.1924A, 507; Re New Bremen-Minster Gas Co. (Ohio) P.U.R.1920F, 409; Re Utah Rapid Transit Co. (Utah) P.U.R. 1926D, 688; Re Utah Light & Traction Co. (Utah) P.U.R. 1927A, 310; Re Virginia R. & Power Co. (Va.) P.U.R.1924D, 755; Re Newport News & H. R. Gas & E. Co. (Va.) P.U.R. 1925A, 480; Re United Electric R. Co. (R. I.) P.U.R.1927E, 200; Re Belt Line R. Co. (N. Y.) P.U.R.1919D, 56; Re Buffalo & E. R. Co. (N. Y.) P.U.R.1925E, 849; Re Yonkers R. Co. (N. Y.) P.U.R.1925D, 195; Re Hudson Valley R. Co. (N. Y.) P.U.R.1927C, 326; Re Grand River Gas Co. (Okla.) P.U.R. 1917C, 1032; Ex parte Central Illinois Pub. Service Co. (Ill.) P.U.R.1916B, 920; Re Bloomington & N. R. & Light Co. (Ill.) P.U.R.1922E, 770; Smith v. Atlantic Southern R. Co. (Iowa) P.U.R.1915F, 125.

An interpretation of the statutory provisions of our state that a public utility may itself determine when and where it will continue its service, subject to Commission review upon complaint or upon the Commission's own initiative, presents practical difficulties in a case like the present where a state aid highway is about to be reconstructed at considerable expense. If the utility abandons service without Commission consent, and such voluntary abandonment be afterward condemned and service ordered to be re-established, the highway, if rebuilt, must be torn up to permit the relaying of the tracks, a proceeding productive of economic waste, which many utilities could ill afford to suffer.

The interpretation we adopt still allows a utility to discontinue service in cases admittedly clear, subject to Commission review but, at the same time, offers opportunity for precedent hearing and judgment where voluntary discontinuance of service would be attended by the possibility of an order of restoration at great expense.

[4, 5] The Commission is required to inquire into any neglect or violation of the laws of the state by any public utility and this requirement includes the enforcement of the duty to furnish safe, reasonable, and adequate facilities for public accommodation; whether such facilities are adequate may be disclosed only upon a hearing and consideration of the public need. A determination after hearing that there is no public need of a branch P.U.R.1928E.

street railway line is an indirect way of assenting to abandonment. Our study of the cited authorities re-enforces our belief that we have jurisdiction in the instant case.

The Case on Its Merits.

Our study of the financial structure and record of the past few years of the entire system (the petitioning Androscoggin & Kennebec Railway Company) gives no sanction to the thought that this company may indefinitely absorb the losses and pay the expenditures required for improvement of the Winthrop line.

Two kinds of the petitioner's capital stock are presently outstanding, both issued at the time of the reorganization of the Lewiston, Augusta & Waterville in 1919:

First preferred	6%	\$1,468,500.00
Second preferred	5%	1,708,200.00

Dividends upon these have been at the rate of 6 per cent on the first preferred for June 1, 1921 to June 1, 1928, aggregating yearly \$88,110 and upon the second preferred as follows:

October 1, 1922	2½%	\$42,705.00
April 1, 1923	2½%	42,705.00
October 1, 1923	2½%	42,705.00
April 1, 1924	2½%	42,705.00
October 1, 1924	2½%	42,705.00
April 1, 1925 .....	.....	None
October 1, 1925 .....	.....	None
December 1, 1926	\$1.00	17,082.00

From these figures it appears the system in its entirety (the petitioner) is not earning revenues adequate to pay reasonable dividends upon its stock—stock obtained upon a reorganization with its resultant sale of the property and in exchange for bonds. It was in evidence that the last dividend was not earned by the amount of \$17,265.01 which was accordingly withdrawn from surplus.

In addition to the capital stock of the company is a funded unmatured debt amounting to \$1,283,500, a portion of which is an underlying lien upon essential and seemingly indispensable parts of the system. The interest upon this debt has been unfailingly paid each year. The gross revenue of the company for the first six months of 1928 was \$64,277 less than the corresponding six months of 1927.

P.U.R.1928E.

Before we pass from the company's financial condition as a system, to consider the Winthrop branch, which is immediately our problem, let us record that the evidence, re-examined by us and compared with our official reports, discloses the following: [Table omitted.]

[6] The Winthrop line is in a poor physical condition. The cars operate over a rather rough road-bed; considerable expenditure will be necessary in the near future to rebuild the overhead equipment, replacing poles whose usefulness is near exhaustion. The general manager estimates this to be "over twenty thousand dollars," which should immediately be spent upon the line.

The cars themselves are of a one-man type and not objectionable for use upon the line. They certainly are large enough to meet the present needs of the traveling public.

We believe that this line's usefulness, to the limited number of persons who patronize it, does not justify the present economic burden imposed upon those passengers who use other portions of the system, for if the line itself be operated at a deficit, such deficit must be made up by increased earnings from the rest of the system, and the company's financial condition does not warrant the belief that this is an avenue to be followed to escape from cessation of service.

The time consumed in traversing the fourteen miles between Augusta and Winthrop of nearly an hour weighs in the mind of the public against the twenty-five or thirty minutes used by public motor vehicles or private automobiles. The line traverses a prosperous section of our state, passes well developed summer resorts; and from these sources comes no persuasive opposition on the part of the public to the granting of this petition. Such opposition should be accompanied by cogent reasons for continuing a line whose revenues over such a long period of time indicate indubitably the absence of reasonable prospect for improved financial condition.

The passenger earnings of the Winthrop branch have diminished with rhythmic regularity. This appears thus:
P.U.R.1928E.

Year.	Passenger Earnings.
1919	\$40,310.90
1920	41,538.58
1921	44,225.91
1922	39,216.05
1923	31,810.69
1924	27,547.10
1925	23,676.33
1926	22,472.78
1927	20,257.15

The passenger earnings of this branch line decreased 33.9 per cent for the first six months of 1928 when compared with the same period of 1927, while the index of decrease for the entire system for these periods appears as 12.2 per cent. We believe the continuation of this branch would require a large expenditure of money and we find no reason to expect that its future revenues would justify the withholding of our consent. No growth of population in the section affected is impending, and we search the record in vain for expedients that might permanently or even for a short time bring increased business affording new revenues in sufficient amount to make the branch self-supporting, or nearly so. No reasonable lessening of operating expenses is feasible. Fares are admittedly as high as experience here and elsewhere manifests the public will pay or ought to be required to pay.

In Re Portland R. Co. R. R. 1434, P.U.R.1928E, 300, 304-306, we indicated certain essentials which should be submitted to the Commission in cases of this character, saying:

"In our opinion the granting of consent for the extreme measures contemplated by the petitioner should be in the presence of proof, detailed, definite, and cogent. Nothing should be left to intendment, conjecture, or forced inference. . . . While operating experience or emergent circumstances may show the expediency or the necessity of abandoning a street railroad service previously rendered by rails laid in the streets of municipalities, and the substitution of motor vehicles, reasons for such a course should be clear, assuringly decisive, unequivocal. . . . The reasons impelling the management to such a change we may assume to have been well grounded and their decisions to have been reached after study. Such a change in the system of trans-

P.U.R.1928E. "

portation requires, we think, the presentation to the Commission of facts reasonably dispelling any doubt of the Commission's duty not to withhold such permission. . . . The abandonment of a street railway system in these latter days, when so many of our citizens provide their own transportation by private automobile, may sometimes be of imperative economic necessity but such should be substantiated by evidence before the company resorts to an abandonment of its public duties, . . .”

We have applied these principles to the case before us. Students of authority in discussing principles partially controlling the situation before us have enunciated doctrines that appeal to us through the force and logic of their clear statement.

“The company must make an honest endeavor to satisfy the wants of the public, and must use all means in its control to do so; but having done all in its power, it cannot be charged with the failure of its endeavors. . . . The duty of a railroad company to operate its road requires it merely to meet the public wants and exigencies. If there is not sufficient traffic over a particular line of road to pay for the expense of running trains, this is sufficient evidence that the public do not require it to be kept in operation; and in such case the company may cease operating the road, unless this be contrary to the express terms of its charter.” Morawetz, *Private Corporations*, Second Edition, § 1119.

“The company, although devoting its property to the use of the public, does not do so irrevocably or absolutely, but on condition that the public shall supply sufficient traffic on a reasonable rate basis to yield a fair return. And if at any time it develops with reasonable certainty that future operation must be at a loss, the company may discontinue operation and get what it can out of the property by dismantling the road. To compel it to go on at a loss or to give up the salvage value would be to take its property without the just compensation which is a part of due process of law. . . . So long as the railroad company ‘continues to exercise’ the privileges conferred by its charter, the state has power to regulate its operations in the interest of the public, and to that end may require it to provide reasonably safe and adequate facilities for serving the public, even though

P.U.R.1928E.

compliance be attended by some pecuniary disadvantage." Railroad Commission v. Eastern Texas R. Co. 264 U. S. 79, 68 L. ed. 569, P.U.R.1924C, 407, 410, 411, 44 Sup. Ct. Rep. 247.

In the case just cited the question presented was the right of the company to abandon its service and line as an entirety, but we refer to it because the court emphasizes that the public must supply traffic at reasonable rates sufficient to yield a fair return.

[7] Our attention has been called to Chap. 137 of the Private Laws of 1911 which ordains:

"No corporation granted a right or location in the streets of Augusta shall abandon or discontinue the use of a portion of said location without the consent of the municipal officers."

This act antedates the creation of the Public Utilities Commission.

It is no longer dubitable that public utilities may not abandon service and remove their facilities in the presence of restrictive contracts, ordinances, or statutes. Brooks-Scanlon Co. v. Railroad Commission, 251 U. S. 396, 64 L. ed. 323, P.U.R.1920C, 579, 40 Sup. Ct. Rep. 183; Bullock v. Florida ex rel. Railroad Commission, 254 U. S. 513, 65 L. ed. 380, P.U.R.1921B, 507, 41 Sup. Ct. Rep. 193; Railroad Commission v. Eastern Texas R. Co. *supra*.

In the case before us the corporation, organized under the general law, has a charter that is permissive and not mandatory and no evidence before us gives indication of contracts, ordinances or statutes we should properly consider, except Chap. 137 of the Private Laws of 1911, to which we have just referred. It will be observed upon careful reading that this restriction is upon the abandonment or discontinuance of a portion of said location. It does not appear to us to inhibit the granting of our consent in the instant case. The Winthrop branch passes through the towns of Manchester and Winthrop, and as to these, surely the municipal officers of Augusta have no jurisdiction beyond the city limits, and we are not convinced from a careful reading of Chap. 137 that the design of the statute was to meet a situation like the pending one. In any event, no knowledge has come to us of action expressing the city's opposition to abandonment P.U.R.1928E.

in the present case. Its mayor, a lawyer of experience and learning, entered his appearance in the case, was present at all of the hearings, and while alertly observant of the proceedings, initiated no action on the part of the "municipal officers" to prevent the abandonment of the Winthrop branch. In the interest of clarity of thought, be it observed we do not determine whether this Commission has authority on behalf of the state to grant relief from the obligation of a mandatory charter. Such question is not before us.

It is *ordered, adjudged and decreed*

1. That The Androscoggin & Kennebec Railway Company be permitted permanently to discontinue service upon the Winthrop branch line and to remove the rails, equipment, and apparatus employed in the operation of the cars upon said branch, after giving reasonable public notice of its intention to take such action.
2. That the petitioner be permitted to sell such of its property used in connection with the Winthrop branch line as is necessary or useful in the performance of its duties to the public, under § 40 of Chap. 55 of the Revised Statutes.

Note.—Service.

- I. *Commission jurisdiction, powers, and duties, 367.*
- II. *Duty to serve, 368.*
- III. *Abandonment and discontinuance:*
 - a. *In general, 369.*
 - b. *Inadequate return, 370.*
 - c. *Improper action of patrons, 372.*
- IV. *Substitution of service:*
 - a. *In general, 372.*
 - b. *Railroad agency stations, 373.*
- V. *Service by particular utilities:*
 - a. *Unified transportation service, 374.*
 - b. *Automobile, 374.*
 - c. *Electric, 377.*
 - d. *Gas, 377.*
 - e. *Irrigation, 377.*
 - f. *Railroad, 378.*
 - g. *Street railway, 379.*
 - h. *Telephone, 380.*
 - i. *Water, 382.*

I. Commission jurisdiction, powers, and duties.

Authority of the Public Service Commission has been held by the supreme court of Alabama not to be required as a necessary condition precedent to the abandonment of a street car line, which is incidental to the very comprehensive scheme of traffic regulation adopted by the municipality, and consented to by the street railway. A statute of that state (1923, § 9184) provides that nothing contained in a previous article (§ 9798) shall be construed as a limitation or restriction upon the police jurisdiction or the power of a municipality over its streets or highways. *Birmingham Electric Co. v. Allen*, — Ala. —, 117 So. 199, May 24, 1928.

The Commission has the authority of law to consider whether local passenger train service should be permitted to be discontinued, and to receive and consider the communications and testimony of interested parties as well as the consideration of the general train movements with relation to public safety and convenience. *Re Chicago, I. & L. R. Co.* (Ind.) No. 9347, May 4, 1928.

A hot water heating company refused permission by the Indiana Commission to abandon its plant, asked that it at least be relieved of liability in connection with the failure of its service in case of a breakdown during the coming season. It was held: "The Commission further finds, in agreement with the position of the respondents, that the Commission legally cannot limit or attempt to limit, negative or attempt to negative any liability which might accrue against the petitioner by virtue of a breakdown during the next heating season beyond the control of the utility, and will, therefore, make no attempt to limit this liability which might occur against the petitioner." *Re Indianapolis Power & Light Co.* No. 9389, June 29, 1928.

It is not within the province of the Commission to determine the question of closing a local telephone exchange where a statute specifically provides the procedure to be followed in such a situation. *Re Lincoln Teleph. & Teleg. Co.* (Neb.) Application No. 6935, Feb. 20, 1928.

The Commission has authority to order the restoration of particular train service where public convenience and necessity requires a continuance of such operation. *Re Genesee & Wyoming R. Co.* (N. Y.) Case No. 4537, April 11, 1928.

The Commission has authority to order the discontinuance of unprofitable train service where the company's charter imposes a binding obligation to render adequate service, notwithstanding the absence of a statutory provision expressly conferring such power upon the Commission. *Ibid.*

The Commission has no authority to require a railroad to enter P.U.R.1928E.

upon property off of its right of way to replace a track which it may have already removed with or without legal right. *Freas v. Erie & Wyoming Valley R. Co. (Pa.)* Complaint Docket Nos. 7503, 7505, May 1, 1928.

The Commission has jurisdiction to require a railroad to maintain a switch connection to a siding track provided by a prospective shipper, if under all circumstances such a requirement is reasonable, and to maintain such connection in a fit condition as far as the boundary of its right of way. *Ibid.*

The Commission has authority to order a physical connection between farmers' exchanges which are subject to the public utility laws of the state. *Re Commonwealth Teleph. Co. (Wis.) U-3597, April 17, 1928.*

The Wisconsin Commission under the state law has no authority to compel a bus company to continue its operation if the company desires to go out of business. *Re Wisconsin-Michigan Power Co. R-3508, May 3, 1928.*

II. Duty to serve.

An order requiring additional service by an authorized carrier where it appears that he cannot render such service, except at a permanent net loss on his entire operation, cannot be sustained. *Re Colorado Cab Co. (Colo.) Application Nos. 894 et al. Decision No. 1810, June 7, 1928.*

The obligation which a utility, in accepting a franchise, assumes to furnish all the inhabitants within the limits of the chartered territory, is subject to the implied limitation that there will be a reasonable demand for such extension as measured by a reasonable return. *Re Berton (Conn.) Docket No. 5089, May 17, 1928.*

A contention of a telephone company, as a defense to a complaint of citizens of a particular community for the establishment of telephone service, that the citizens should themselves construct an exchange and negotiate with the company with a view to tying up with long distance service was held untenable where the citizens were not engaged in the telephone business, had no knowledge of plant construction or operation, and were not under any obligation to establish such service. *Gonzales v. Southern Bell Teleph. & Teleg. Co. (La.) Order No. 503, No. 964, May 21, 1928.*

An order was held reasonable which required a telephone company having a net-work of lines reaching the most remote areas of a state and traversing in many instances waste and unproductive territories in order to reach settled communities beyond, to establish service in an unserved territory having a rural and urban population of ten thousand persons in need of, and willing to pay for, such P.U.R.1928E.

service which might be accomplished by bridging a gap of seven miles. *Ibid.*

The acceptance of a permit from the state by a utility, as evidenced by its construction of a transmission line thereunder, places the company in the position of having accepted an indeterminate permit in a town through which the line passes, and in connection therewith the obligation to serve locally under reasonable terms and conditions. *Johnson v. Eagle River Water & Light Commission (Wis.) U-3649, May 26, 1928.*

III. Abandonment and discontinuance.

a. In general.

The Commission will not permit discontinuance of service to a consumer who has been receiving service for some ten years, on the ground that the use by such consumer of a ram for pumping is very wasteful, as long as payment is based upon the total gross amount of water delivered. *Williams v. Utica Mining Co. (Cal.) Decision No. 19639, Case No. 2266, April 20, 1928.*

A railroad seeking to discontinue local train service was ordered to continue the same until the Commission should have an opportunity to hold a public hearing to determine whether or not such discontinuance should be permitted. *Re Chicago, I. & L. R. Co. (Ind.) No. 9347, May 4, 1928.*

Permitting the discontinuance of local trains for inadequate revenue, the Missouri Commission said: "Under the Public Service Commission Law, communities served by utilities must be given adequate service, but the amount of service necessary to be deemed adequate must be determined largely by the amount of demand for service that exists in the communities. Here, fortunately, we may consider the demand for additional service in the light of actual operating experiences under a schedule admitted to be practically the same as that contended for, and both the operating data and admissions of complainants show that the demand for the more abundant service was not commensurate with the cost." *Bunceton Chamber of Commerce v. Missouri P. R. Co. Case No. 5804, July 18, 1928.*

A petition to abandon a local exchange was entertained where signed by 44 of 57 subscribers under a provision of a statute requiring at least 60 per cent of subscribers to consent to an abandonment. *Re Northwestern Bell Teleph. Co. (Neb.) Application No. 7023, Dec. 29, 1927.*

A railroad must continue to carry out that duty which it is under obligation to perform as a result of its acceptance of a charter as well as the duty to furnish necessary public transportation notwithstanding the fact that a particular passenger operation might entail a financial loss, unless and until a reasonably convenient and adequate P.U.R.1928E. 24

alternative service is offered either by operation of motor busses or otherwise. *Re Genesee & Wyoming R. Co. (N. Y.) Case No. 4537, April 11, 1928.*

The abandonment of an entire passenger service is essentially different in its nature from the abandonment of unprofitable portions thereof. *Ibid.*

A utility cannot pick and choose nor abandon a portion of its business while operating as to the remainder. *Ibid.*

The Commission of Appeals of Texas decided that where the grantor of certain parcels of real estate in a town had turned over to a corporation waterworks and sewer system which he constructed, after dedicating them to public use and assuming the usual obligations of a public utility, had the right to discontinue such operations and that corporations holding under him had the same right. *West v. Probst, No. 1047-3977, 6 S. W. (2d) 96, May 2, 1928.*

A sewer company can abandon its service only after a long enough period has been allowed to provide other sewerage, or in some cases a substitute therefor. *Ibid.*

A water company can abandon its service only after a long enough period to provide a new supply. *Ibid.*

b. Inadequate return.

The California Commission has held that authorization to abandon service should be denied where the utility was receiving a return in excess of 5 per cent, could earn more by extending service, and where consumers had no other source of supply available at a reasonable cost. *Re Chichizola Estate Co. Decision No. 19686, Application No. 14386, April 27, 1928.*

An interurban railway was permitted to suspend service where it was confronted with an order of the city to pave between the tracks, involving an expenditure for which it could not secure funds to meet, and where it was operating under a large deficit, and where, if the Commission would attempt to fix a rate merely paying operating expenses without return, the rates would be prohibitive. *Re Omaha, Lincoln & Beatrice R. Co. (Neb.) Application No. 7239, May 8, 1928.*

The New York Commission, in authorizing the discontinuance of local train service, stated that the evidence proved that there was no public support of the service in question, and while the afternoon trains were undoubtedly a convenience, particularly in the winter time, the railroad company could not be compelled either in law or equity to operate a passenger service at a heavy loss where there was a lack of public demand. The Commission further stated: "All must recognize the fact that changing conditions are affecting the steam railroad passenger service on branch lines in rural communi-
P.U.R.1928E.

ties. Good roads and automobiles are taking a large amount of the traffic. If there is public interest and a reasonable public use for passenger service on a steam railroad, it should be compelled to continue that service even at some financial loss, or abandon its line." *Camden v. Lehigh Valley R. Co.* Case No. 4836, July 11, 1928.

The New York Commission, in refusing to grant permission to a railroad to abandon local train service which would seriously affect the business carried on in communities through which the trains passed, stated: "While it is true that passenger patronage and revenues are inconsequential, the loss of reasonably adequate express and mail service would be a real blow to the public served by these trains. Possibly other means of furnishing reasonably adequate mail and express service could be adopted, but no concrete suggestion to meet this problem has been offered." *Cato v. Lehigh Valley R. Co.* Case No. 4815, July 11, 1928.

Approval has been granted to a street railway to abandon a portion of its traction system upon evidence that a deficit resulting from that operation was steadily growing. The Pennsylvania Commission stated: "It is a well established rule of law that it is unreasonable to require a public service company whose corporate right is limited to a single power to continue to operate an unprofitable branch of its business when the drain from such operation will result in serious loss to the entire system and the business of the company and impair the service of the company in its entirety." *Re New Castle Electric Street R. Co.* Application Docket No. 17928, June 18, 1928.

The Pennsylvania Commission, in commenting upon the inevitable inconvenience resulting from discontinuance of local passenger train service, stated: "As is always the case in proceedings of this character, there will be some inconvenience result from the discontinuance of the service but where, as here, the total revenues are less than one-third of the operating cost and there does not appear to be any great public need for the service being rendered, the Commission is not justified in requiring the continued service." *Re Pennsylvania R. Co.* Application Docket No. 18186, July 3, 1928.

A street railway earning a return on its entire system minus depreciation of approximately 2.22 per cent was allowed to discontinue on a profitable branch crossing sixteen railroad tracks at grade and four other tracks of its own system causing heavy maintenance charges entailed by reason of such crossings, resulting in an unnecessary burden on the street car system as a whole. The Utah Commission pointed out that the territory now served by the branch could be equally well served by an adjoining line with little inconvenience to the residents of the section, and that in case of future growth automobile bus transportation would be a more practical solution. *Re Utah Light & Traction Co.* Case No. 978, May 10, 1928.
P.U.R.1928E.

In answer to a complaint before the Wisconsin Commission for refusal to extend service to a rural consumer, a telephone company decided that the proposed extension would involve seven miles of new line and would require the stringing of additional circuits on existing pole leads for a distance of approximately five and one-half miles. It took the position that under existing rate schedules it could not afford to make the extension, since the revenue to be derived would be insufficient to support the required investment. It was admitted, however, that the saturation of the proposed line would be approximately as great as that of the existing rural system of the company. The Commission pointed out that the company had assumed the obligations of a public utility furnishing telephone service and that it was a part of that duty to render service to such residents that might apply for it under reasonable terms and conditions. The Commission stated: "If the rates now charged by the applicant are insufficient to yield a reasonable return on the fair value of the property, the company has its remedy in an application to this Commission for authority to increase rates. The fact that the proposed extension may not be justified under the existing rates is, therefore, not a sufficient reason for failing to render service to the applicants." Railroad Commission ex rel. Smith v. Pittsville Teleph. Co. U-3719, July 21, 1928.

c. Improper action of patrons.

The person in whose name service is rendered by a utility to premises where current has been unlawfully diverted, is presumed to have known and profited by such diversion notwithstanding the fact that the Commission is unable to ascertain who actually diverted the current. Macke v. Union Electric Light & P. Co. (Mo.) Case No. 5630, April 13, 1928.

A consumer to whom service was discontinued because of an unlawful diversion of current around the electric meter was required to deposit an amount sufficient for the cost of installing a lock box to protect against future meter tampering as a condition precedent to the restoration of service. *Ibid.*

IV. Substitution of service.

a. In general.

Authorization to abandon service and to transfer a distribution system was granted notwithstanding protests made on the ground that the water supply of the purchasing company, being diverted from a stream, was subject to possible contamination and that it had an unpleasant odor and taste, where tests showed the supply to be free from harmful bacteria, where the supply was chlorinated, and par-P.U.R.1928E.

ticularly where the old company was operating at a loss. Re Rentz (Cal.) Decision No. 19025, Application No. 13791, Nov. 8, 1927.

The Colorado Commission permitted a railroad to curtail certain train service upon a showing that steadily increasing deficits were being incurred and in view of the satisfactory nature of the automobile service with the following conditions: "That the train service shall be re-established at and during such times as automobiles are unable to operate over the public highways between Como and Fairplay, the county road supervisor to determine when such a condition exists." Re Colorado & S. R. Co. Application No. 1051, Decision No. 1800, May 29, 1928.

A telephone company was permitted to abandon a local exchange where the evidence showed severe losses in revenue and where the patrons could be connected to a neighboring exchange having 24-hour service, lower monthly rates and other advantages. Re Northwestern Bell Teleph. Co. (Neb.) Application No. 7023, Dec. 29, 1927.

Authority was granted by the Utah Commission to a street railway company to discontinue rail service and substitute therefor an electric bus service upon the following finding: "That if the present street railway system is maintained on Fourth East, it will be necessary for applicant to repave the track zone on said street and rehabilitate the tracks, and that said rehabilitation and pavement would cost approximately one hundred and seventy thousand dollars; that public convenience and necessity does not require the operation of a street railway system on said street, but that the public convenience will be equally if not better subserved by the substitution of electric trolley busses operating on rubber, pneumatic tires, instead of street railway tracks." Re Utah Light & Traction Co. Case No. 1038, July 9, 1928.

Permission was granted by the Wisconsin Commission to a telephone company to change the location of a rural exchange from a small community near the limits of a city to a somewhat larger community growing more rapidly nearby, where the former arrangement had been unsatisfactory owing to the fact that the service had been practically all confined to multi-party service because of the expense of rendering single party service at a great distance from the central office. The new location would permit the rendering of single and two-party service without an excess radius charge to the subscribers in both communities. Re Wisconsin Teleph. Co. U-3711, July 30, 1928.

b. Railroad agency stations.

The Missouri Commission, in refusing an application of a railroad, in Re Missouri P. R. Co. Case No. 5694, May 5, 1928, to discontinue P.U.R.1928E.

ANNOTATION.

an agency station and substitute caretaker service therefor, stated that the Commission must give consideration to the rights of patrons and communities served by a railroad as well as cognizance of the efforts of carriers towards the economical operation, and that the patrons of railroad companies are entitled to a service commensurate with the demands of each particular community along the line involved.

Granting authority to a railroad to substitute custodian for agency service at a station taking in approximately \$1759.33 revenue as against \$650 expenses for a 6-month period, the Missouri Commission stated: ". . . The substitution of a caretaker for a regular agent at other similar stations has not in the past been as unsatisfactory to the shipping public as had been anticipated." Re Missouri P. R. Co. Case No. 5802, June 9, 1928.

An application of a railroad to substitute custodian service at a station where the record of the earnings did not show a pronounced decline over a considerable period of time, such as would ordinarily justify a reduction in service, was refused in view of the progressive character of the station and the long period for which the community had been accustomed to agency service. Re Chicago, M. St. P. & P. R. Co. (Wis.) R. 3504, May 22, 1928.

V. Service by particular utilities.***a. Unified transportation service.***

Unification of service must mean the conversion of the service rendered by two transportation systems to such service as would be rendered if the two systems were one system, as nearly as that may be done equitably. Re Peoples Motor Coach Co. (Ind.) Nos. 34-M, 550-M, 542-M, March 2, 1928.

The unification of service and the unification of fares and transfer charges are not separable and in the process a "city-wide" basis should be reached. *Ibid.*

Patrons of a through bus line are entitled to free transfers either to another bus line or to a street car line where unification of service is sought by rearrangement of routes. *Ibid.*

b. Automobile.

A slight disruption of service as a result of bankruptcy proceedings involving the estate of a motor bus operator was held to be no real abandonment of service. Re Pasadena-Ocean Park Stage Line (Cal.) Decision No. 19318, Application Nos. 14232, 14188, 14207, Case Nos. 2435, 2436, Feb. 6, 1928.

The amount of equipment to be used by motor carriers availing themselves of permission to render sight-seeing service in a territory of scenic attraction was limited to the quantity specifically des. P.U.R.1928E.

ignated in their certificate. Re Buster (Colo.) Application No. 572, Decision No. 1683, April 21, 1928.

No one-way transportation of passengers was permitted to any points in the territory of scenic attraction where sight-seeing service was permitted. *Ibid.*

Sight-seeing service was permitted to motor carriers in a territory of great scenic attraction, with the limitation that all such operation should be limited to round trips originating and terminating at the point of origin of the service. *Ibid.*

The rendition of service by irregular motor operators only when a certain number of passengers were available was held not to satisfy public demand where a single passenger would be compelled to wait until the different operators had collected enough passengers between them to justify one of them making the trip. Re Colorado Cab Co. (Colo.) Application Nos. 894 et al. Decision No. 1810, June 7, 1928.

Public convenience will not justify permission for irregular motor operators rendering service only when a certain number of passengers are available to make one-way trips or round trips with stop-over privileges, in view of the great inconvenience to a returning passenger wishing to come back on a day when no operator could collect sufficient patronage to justify the first part of the journey. *Ibid.*

Stopping busses to permit passengers to take pictures was allowed as part of the service by motor utilities on a scenic tour. *Ibid.*

Permitting the majority of passengers to decide the route of a scenic tour was held to be unsatisfactory service in view of the wishes of patrons having more time to spend conflicting with those wishing rapid transit, and where one-way or stop-over privileges might result in some patrons being compelled to go and return by the same route. *Ibid.*

Regularly scheduled service over various routes of a scenic tour was held to be a more satisfactory arrangement than permitting the majority of passengers to decide the route to be taken. *Ibid.*

Express service will not be restricted to the amount that can be carried in passenger busses where a Commission rule limiting the amount so carried to that consistent with the comfort of passengers would operate to deprive a territory of valuable daily express service. Re Butte-Virginia City Freight Service (Mont.) Docket M.R.C. No. 37, Report & Order No. 1506, April 16, 1928.

There is no distinction in the field of motor transportation between "freight" service and "express" service as the terms do not have the precise meaning that they enjoy with reference to carriage by rail. *Ibid.*

P.U.R.1928E.

A certificate of convenience and necessity will not be issued to an applicant who has declared his intention of serving "for accommodation" only the customers of his general business, since the power of arbitrary selection would destroy the public character of his employment. *Re Didriksen* (Mont.) Docket No. 262, Report & Order No. 1496, Nov. 16, 1927.

An arrangement between an interstate and a local motor carrier whereby the former deposited shipments to points within the state at a common point along their routes to be picked up and delivered by the latter was not restrained in view of the great convenience to the shippers in the territory served and the jurisdiction of the Commission to stop the practice should it at any time result in unfair competition. *Mushroom Transp. Co. v. Carroll & Fox* (Pa.) Complaint Docket No. 7481, May 8, 1928.

An applicant, refused authority to operate without restrictions because of the adequacy of existing service, was granted a "class B" certificate to handle physicians' calls for country trips, to make trips to different points in connection with the supervision and sale of real estate, and to take care of what might be termed "overflow business" not handled by a regularly scheduled service. *Re Hewett* (S. D.) Order No. 2176-B, May 15, 1928.

The Washington Department, in denying a certificate to a motor utility operator for the pick-up delivery service of perishable farm produce, stated: "Only the very early and very late fruit and vegetables are shipped out. The market for these is Seattle and eastern cities of the United States and they naturally move by express. It would be illogical and impracticable to haul vegetables by truck 123 miles from Tonasket to Wenatchee to load them on an express car when same could be loaded on the express car at Tonasket and reach the market just as quickly. In this connection it may be noted that experienced fruit shippers testifying at the hearing doubted the advisability of shipping vegetables and soft fruit any distance by truck." *Re Davis & Banker*, D-240 et al. Order No. 2310, June 18, 1928.

Auto transportation companies should expect to and be prepared to make some effort to overcome isolated obstructions to traffic in order to maintain continuity and regularity of service, but there is a limit to the degree of such responsibilities. *Iron River v. Northland Transp. Co.* (Wis.) AT-3, March 19, 1928.

The propriety of transportation companies sustaining operation in the face of adverse road conditions must be determined in each case in the light of the facts relating thereto. *Ibid.*

A suspension of service by a transportation company over a con-
P.U.R.1928E.

siderable part of the winter was held not unreasonable because of the almost continuons blockade against through traffic by reason of heavy snowfall along the route. *Ibid.*

c. Electric.

A utility should install such equipment as is necessary to maintain system voltage within the allowable limits prescribed by Commission regulation. Department of Public Works ex rel. Deer Park v. Mount Spokane Power Co. (Wash.) No. 6071, May 10, 1928.

A utility should make voltage surveys not less than once every six months to determine the character of service furnished, as required by a Commission rule. *Ibid.*

In Department of Public Works ex rel. Morton v. Morton Electric Co. (Wash.) No. 6130, May 21, 1928, the engineer for the Department testified that the variation in voltage and frequency on the company's system was greater than allowed by the Department's rules and regulations, due in all probability to the fact that the system was not equipped with proper meters and recording instruments. The company admitted its derelictions at the hearing and promised to remedy them at once. It was thereupon stated: "Nothing more need be said of the matter save that the Department's general rules and regulations regulating electrical service are mandatory and may be enforced by penalty action in the court."

A utility alleging financial pressure was ordered to furnish reasonable and proper service in an unincorporated village through which its transmission line ran, upon the local authorities or residents placing a deposit or giving adequate security for the payment of the cost of transformers and distribution lines from existing high tension line to residences, meter equipment to be furnished at the utility's expense. Johnson v. Eagle River Water & Light Commission (Wis.) U-3649, May 26, 1928.

d. Gas.

An emergency order requiring a local distributing company to connect and secure an additional supply of gas for domestic consumption in a city was entered where the company's wells were rapidly being depleted and the supply was inadequate and a private owner of wells in the vicinity proposed to supply any amount and to install the necessary pipes for the connection. Re American Indian Oil & Gas Co. (Okla.) Cause No. 8503, Order No. 4109, Feb. 17, 1928.

e. Irrigation.

All persons residing within the service area of a public utility are entitled by legal right to service upon application therefor, without discrimination, to the reasonable extent of the utility's facilities, providing that extension of such new service will not unduly P.U.R.1928E.

prejudice the rights of existing consumers to continue service. *Williams v. Utica Mining Co.* (Cal.) Decision No. 19639, Case No. 2266, April 20, 1928.

An irrigation utility found guilty of various discriminatory practices was required to render a reasonable and adequate water supply to all present users as well as any others properly entitled to it until such a time as it should make arrangements acceptable to the Commission for general distribution. *Ibid.*

A rotation system of delivering water for irrigation purposes was recommended, providing that consumers would receive waters applied for in the quantities and at the times required. *Ibid.*

f. Railroad.

In a complaint by operators of box factories against the alleged failure of railroads to permit transit privileges in the transportation of raw commodities, the Arizona Commission made the following comments concerning the appurtenancy of evidence introduced by the carriers: "Defendants introduced several exhibits carrying numerous rates without transit privileges. They failed however, to show the conditions surrounding the establishment of these rates and whether or not there had been any necessity or demand for transit privileges. This evidence is not of a character to justify a finding adverse to complainants' contentions." *Arizona Box Co. v. Apache R. Co.* Docket No. 3238-R-303, Decision No. 4520, July 31, 1928.

Railroad employees are entitled to no less protection in the matter of safety devices and ordinary conveniences than the general public and their number traveling upon free passes should be taken into account in traffic checks to determine the necessity for the installation of service conveniences. *Louisiana Pub. Service Commission v. Texas & N. O. R. Co.* (La.) No. 953, Order No. 504, June 5, 1928.

Train sheds were ordered to be installed by a railroad for the convenience of passengers getting on and off trains necessarily stopping considerable distances from the depot of a city having large passenger service. *Ibid.*

A railroad was not required to furnish a heavy derrick costing a considerable sum for the purpose of loading and unloading heavy granite blocks for the convenience of a particular shipper in view of the fact that shippers along its line did not generally require such convenience and that it was the duty of the consignor by statute to load and unload carload shipments. *Gilmer v. Great Northern R. Co.* (Minn.) No. A-4130, May 11, 1928.

The establishment of an additional railroad station was refused by the New Jersey Board of Public Utility Commissioners upon evi-P.U.R.1928E.

dence not only that the prospective return would be inadequate but that the establishment would slow up and inconvenience commutation service to New York city by patrons living further out from the metropolitan area. The Board said: "It has been contended that the objections to delays to express trains by an additional stop may be met by using the proposed station at West Side avenue for trains which do not stop at Manhattan Transfer. But in view of the large number of trains operated this would, in our opinion, materially interfere with the existing fast train movement through the territory. We are also of the opinion that the prospective patronage would not be sufficient to justify the financial expenditures involved in the construction of a station building with the necessary elevated platforms and rearrangement of tracks to meet the requirements of the electric train service." *Re Mayor and Aldermen of Jersey City*, Sept. 6, 1928.

The action of a railroad in severing switch connections and removing rails and ties of a spur track to industrial patrons because of the fact that the siding extended across the property of a private company was held to be unjust and unreasonable where there was no evidence that the company had ever objected to the presence of the track or directed its removal. *Freas v. Erie & Wyoming Valley R. Co. (Pa.)* Complaint Docket Nos. 7503, 7505, May 1, 1928.

A complaint asking the construction of a union depot in a town having two railroad systems was dismissed where the lack of public convenience, due to conditions referred to in the complaint as compared with conditions prevailing at other towns within and without the state, as well as a judicial recognition of the adverse effect of motor vehicles upon short haul passenger traffic, did not necessitate the cost of such construction. *United Commercial Travelers of America v. Chicago, M. & St. P. R. Co. (S. D.)* Docket Nos. F-748, 3141, Dec. 29, 1927.

The use of kerosene lamps to light the station house and platform of a railroad in a town where 24-hour electric service was available was held to constitute a dangerous condition where the station platform was not bounded by railings or steps and upon which freight and baggage accumulated. Upon testimony that women passengers frequently went to the house of a resident a short distance away from the station rather than wait in the dark, the South Dakota Board of Railroad Commissioners ordered that adequate electric illumination be installed. *Yale v. Great Northern R. Co. F-1149*, June 18, 1928.

g. Street railway.

The Connecticut Commission, in approving of a petition by a street railway company to discontinue service over a certain route and sub-P.U.R.1928E.

stituting busses therefor, stated: "In the interest of public safety the Commission orders the petitioner, as a condition of the approval and authorization given above, to remove or cause to be removed at its own expense, whenever so requested by the party responsible for the maintenance of the highway, rails, ties, poles, wires, and other fixtures not used by it in the rendition of public service, wherever such fixtures are within the limits of the public highway, and to replace the highway affected in as good a condition as it was prior to the removal of the fixtures." Re Groton & Stonington Traction Co. Docket No. 5123, June 12, 1928.

The Indiana Public Service Commission, after careful investigation into the kind of equipment to be used in a proposed one-man street car service and the manner in which they would be operated, and after further consideration of the previous loss of revenues to the petitioning corporation, was of the opinion that in order to save the property and to keep the same in operation, the petition of the street railway company for permission to operate one-man street cars should be granted, and it was so ordered. Re Indiana Service Corp. No. 9392, July 6, 1928.

Owl car service was ordered on a city traction line although admittedly unprofitable itself, where it was urgently needed. Milwaukee v. Milwaukee Electric R. & Light Co. (Wis.) R-3458, Jan. 4, 1928.

n. Telephone.

A telephone utility should compensate its farmer line subscribers for their telephone property which will become nonoperative upon the establishment of a new exchange. Re Pacific Teleph. & Teleg. Co. (Cal.) Decision No. 19202, Application No. 14136, Dec. 30, 1927.

A telephone company upon the establishment of a new exchange to replace service from other exchanges over subscriber owned lines should compensate present subscribers for any of their property which will become nonoperative. Re Pacific Teleph. & Teleg. Co. (Cal.) Decision No. 19425, Application No. 14135, Feb. 28, 1928.

In a proposed rate schedule a charge for "extra hand microphones, all classes 50 cents per month" was refused by the Missouri Commission which stated that a charge of 25 cents per month should be used instead, for the reason that while the higher rate was authorized when the class of service was first offered the companies had voluntarily reduced the same to the lower rate. Re Sweet Springs Teleph. Co. (Mo.) Case No. 5832, June 6, 1928.

A telephone company, which has failed to secure sufficient signatures as provided by statute to a petition to abandon an admittedly unprofitable small exchange and substitute better service through a P.U.R.1928E.

neighboring exchange, cannot accomplish the same results indirectly by raising the rates beyond the value of the service even though the return on such rates might not be unreasonably high. *Re Lincoln Teleph. & Teleg. Co. (Neb.) Application No. 6935*, Feb. 20, 1928.

An increase of rates to permit the installation of common battery in lieu of magneto service was approved in an exchange where, because of congested traffic and field conditions, an immediate reconstruction program of either type of service was necessary, in view of the recognized impracticableness of magneto service in larger exchanges and the rapid growth and increased needs of the community. *Re Northwestern Bell Teleph. Co. (Neb.) Application No. 6775*, Sept. 16, 1927.

Town pride should not influence the Commission in bringing about economies for the public and the telephone company, through the authorization of the abandonment of unprofitable local exchanges. *Re Northwestern Bell Teleph. Co. (Neb.) Application No. 7023*, Dec. 29, 1927.

The Wisconsin Railroad Commission made the following comment with regard to service duties of telephone companies: "It appears, however, that the management has not been as prompt as it should have been in some cases in installing telephones and in taking care of difficulties. The Commission wishes to make it clear that no excuse can be sufficient for failure to make installation of telephones promptly and for failure to take care promptly of moves and changes required by customers. The management will be expected and required to take care of such matters as well as of routine service matters with promptness and dispatch, and any complaints which come to the Commission indicating that this requirement is not being fulfilled will be vigorously dealt with." *Re Fountain City Teleph. Co. U-3729*, Aug. 14, 1928.

A garage keeper was permitted to take service from two telephone companies in view of the circuitous routeing of toll calls between the companies and in view of his proximity to the dividing line between the two companies as well as the fact that he was to continue the service of both and the distribution of his patrons was about equal in both territories. *Re Lebanon Teleph. Co. (Wis.) T-1308*, Feb. 13, 1928.

A telephone company should be required upon request to furnish hand-set telephones in view of the fact that this type of equipment furnishes more adequate service under certain circumstances. *Re Wisconsin Teleph. Co. (Wis.) U-3660*, Feb. 23, 1928.

The subscriber must, to a considerable extent, be the judge of what type of equipment is best fitted to give him reasonably adequate service. *Ibid.*

P.U.R.1928E.

Evidence was introduced on an application before the Wisconsin Commission for the discontinuance of free interexchange between two adjoining telephone exchanges showing that 80.1 per cent of the subscribers made no calls. Whereupon the Commission, in approving of the application, stated: "As the testimony in this case shows that the communities affected are not dependent upon each other and that the use of the service is confined to a small percentage of the subscribers, we believe that the free toll service should be discontinued." Re Wisconsin Teleph. Co. U-3730, July 30, 1928.

t. Water.

The installation of meters and services at the expense of consumers is not in accordance with Commission regulations requiring all water utilities to install and maintain, at their own expense, the service facilities from the main to the curb or property line. Re Narbonne Ranch Water Co. No. 2 (Cal.) Decision No. 19602, Application No. 14028, April 13, 1928.

A water utility was required to purchase service facilities owned by consumers and thereafter to make all new installations at its own expense. *Ibid.*

An order requiring a water utility to install meters to premises other than ordinary residences was held not to be an unreasonable burden on the company in view of the comparative scarcity of such a special class. Re Long Beach Water Co. (N. J.) May 1, 1928.

The Pennsylvania Commission made the following comment upon a complaint against a local water company alleging inadequate fire protection to a village by reason of a small sized main and lack of proper reservoir capacity for storage and pressure: "In the light of respondent company's averment of record that 'no provision has been made by the township of Zerbe, the village of Trevorton, or any person or persons for protection against fire and no contract for such purpose exists,'—the Commission has not given much consideration to this feature of the complaint." Reichert v. Trevorton Water Co. Complaint Docket No. 6053, July 3, 1928.

The Washington Department of Public Works, in Department of Public Works v. Chinook Water Works, No. 6096, April 30, 1928, approved of an offer of local citizens to pay the cost of purchasing and installing six hydrants for fire protection in consideration that the company would furnish water and maintenance without charge. The Department by order required the company to install at actual cost plus 10 per cent for superintendence.

P.U.R.1928E.

ALABAMA PUBLIC SERVICE COMMISSION.**RE ALABAMA POWER COMPANY.**

[Non-Docket No. 466.]

Rates — Electricity — Room count — Promotional features.

The modification of a proposed electric rate structure for domestic consumption adopted a unit of three rooms as a basis for demand count with a minimum charge for each additional room limiting the total number to be counted at ten rooms in an effort to stimulate power consumption for heavy duty appliances by the domestic class without endangering public relations.

Rates — Electricity — Promotional feature.

Discussion of the advantages of various structures for domestic consumers tending to stimulate consumption by heavy duty appliances, p. 384.

[September 12, 1928.]

APPLICATION of electric company for revised rate structure for domestic consumption ; granted with modifications.

By the **Commission**: This rate schedule is a new schedule for application in certain small communities, for which class of communities no schedule of rates has heretofore been provided.

The form of the rate differs from those formerly prescribed, providing in the single schedule a rate for the requirements of electrical energy for all residential and commercial usage including power up to 5 horse power.

The communities for which this rate is approved are all small communities to which electric service of petitioner has quite recently been, or is now being extended. Due either to the small size of the community, or remote location to existing transmission lines, the investment to serve them is high, with a resulting high cost of service. These communities, therefore, form a new class occupying a position between the urban and the rural classes for which a schedule of rates should be provided.

Petitioner, in negotiating with these communities prior to the extension of their service had worked out a new rate schedule designated as "A-5," which had been presented to and approved by the several communities. That schedule was filed with the Commission for approval at the time of hearing of petitioner for a certificate of convenience and necessity to make extension of P.U.R.1928E.

its facilities to serve these several communities. Certificates of convenience and necessity were promptly granted, but approval of the rates was withheld by the Commission and petitioner was requested to make certain changes in the rates to make same conform to the views of the Commission, particularly with respect to the service charge element for residential customers.

The Commission believes that the modification of the rate to which the company has agreed, will not destroy the promotional feature that petitioner is advocating—that the revised plan will distribute the initial charges as equitably as it is practical to do at this time, between the different classes of users, and at the same time will eliminate what might be termed the service charge from the rate.

The Commission realizes that the field of domestic electric service is one of rapidly increasing importance, due to the very general use of electric appliances in the home. With the advent of electric ranges, electric refrigerators, electric water heaters and other numerous household appliances, new rate problems are presented. Formerly, the domestic customer used electrical energy almost exclusively for lighting, and was considered a small user, but now that heavy duty appliances such as named above are recognized as standard equipment in the average home, a rate that will permit and encourage the use of electric appliances becomes of increasing importance.

The present block form of domestic rate has been and still is in use by a majority of the electric utilities. The reason for this lies in the fact that domestic service in the past has consisted primarily of lighting, and the block form of rate was found to be easy to compute, simple to explain, and came to be considered almost universally as the only form of rate suitable to the small user. The few kilowatt hours used for lighting in the average home rarely ever extended into the lower blocks of the rate, and for practical purposes the cost of using the major electrical appliances on such rates is altogether prohibitive, so that in effect both the customer and the utility company are losers. It is now recognized, however, that this small user, taken as a class, is the utility's largest prospective consumer, and a change in the form of rate structure has come about logically from the development
P.U.R.1928E.

of the domestic field. The introduction of special rates for cooking, heating, and refrigeration, has been a partial remedy, but these rates have not extended to every customer an opportunity to make use of additional service at a low cost, and it is frequently the case that such special rates have resulted in the necessity for installing more than one meter in a residence where otherwise all service could have been furnished through a single meter had the rate structure permitted.

This Commission has had an opportunity to study the effect of promotional gas rates in several forms in Alabama and has discussed at some length the results and benefits of this type of rate under Docket No. 4465, 35 Ala. P. S. C. 367, P.U.R.1925A, 413, and Docket No. 5193, dealing with the Montgomery gas rate. As the principle involved is applicable to both gas and electric service and has been tried and proven in both fields, it is our conclusion that it supplies a desirable form of rate for domestic service, applicable to both gas and electricity, when the demand and customer expense is apportioned among all customers on a reasonable basis. A "promotional" rate for utility service has been defined as a rate which successfully develops an increasing volume of profitable business. This end is attained when each customer is offered an opportunity to use additional service at a low follow-on rate for energy consumed. In order that a really low energy rate may be offered to every customer, it becomes necessary to establish a relatively high charge for an initial small block of energy, which initial charge is also a minimum charge to partially cover the fixed costs of service such as setting and removing meters, meter repairs, meter reading, bookkeeping and collection expenses, interest charges on services and meters, and similar costs which exist for each customer whether or not any energy is actually used. The problem of the rate maker seems to center generally around the method of assessing such initial charge to the individuals or groups of customers. Our studies have satisfied us of the necessity for graduating such initial charge in order to relieve the customer having a small installation of too great proportion of the fixed service cost which he would necessarily have to pay if an average is struck of all domestic consumers. The larger home should in justice pay a P.U.R.1928E.

higher charge than a small home, in our opinion, provided that to each is offered the same opportunity of obtaining a low rate for energy consumed.

Some practical method must be employed for assessing the individual requirements of domestic customers. Several methods have found general application. It goes without saying that if it were practicable to have a demand meter on each consumer's premises and obtain the actual maximum demand, that there could be no question of inequality. The objection to the use of demand meters for general residential purposes lies in the high cost of such meters, which would unnecessarily increase the cost of service and, therefore, the rate, and some method of estimating the requirements is usually followed. In our investigation we find that some utilities have used the meter size as a measure, others have based their estimate upon the number of outlets or upon the connected load and size of appliances installed. We also find rates assessed upon the area of buildings; this method having been extended to commercial establishments. Our studies, however, lead to the conclusion that a very satisfactory method and one coming into most general use in recent years, is to assess the fixed cost of service to each residential customer in proportion to the size of his home, as determined by the number of active rooms, frequently referred to as the "real estate basis" of rating residences. We have, therefore, adopted a unit of three rooms as the basis for the proposed rate, increasing the charge for the initial block of 5 kilowatt hours by 15 cents for each additional room, limiting the total number of rooms to be counted to ten rooms.

This method, in our opinion, has several advantages over any other which has come to our notice. It is more easily understood by the consumer and there is less chance of disagreement arising between the consumer and the company as to the correct rating to be applied. The consumer may install as many outlets as he pleases without increasing his rate, and it eliminates the continual annoyance to the public and expense to the company of frequently checking the connected load.

The form of rate which we are approving for service to these small communities affords to each customer a very low rate for P.U.R.192SE.

the use of energy over and above his minimum allowance and he will be able to buy increased requirements of energy at rates greatly below what he would have to pay on the old form of block rates.

Most of the electric utilities in Alabama today are using two and sometimes three meters in a single residence where major appliances are in use. The proposed rate has the advantage of simplicity, as only one meter is used for all domestic service and in commercial establishments one meter will measure all lighting and appliance use including motors up to 5 horse power. Each class of service will pay proportionately to the cost of service. It is expected that the low energy rates established by this schedule will increase the monthly use by the customer over what could be expected on the old form of block rate to a point where, at some future time, the lower rates of the company may then be extended to these small communities, which are now willing to pay a higher rate in order to obtain electric service during their development period.

The Commission desires to approve rates designed to offer greater opportunity for domestic use of electricity at low rates, thereby promoting the use of labor saving appliances in the homes of Alabama, provided, however, that they offer just and reasonable rates to all classes of users affected by the schedule. This schedule, as now revised, designated as "A-5," we believe provides a just and reasonable rate for small towns and communities for which it is approved.

In conclusion, the advantages of this rate to the domestic consumer may be briefly summarized as follows:

1. Permits the use of appliances in the home at rates much below the lighting rate.
2. Enables the small householder to receive as low a rate for additional use as the large householder.
3. Measures all current through one meter and makes every outlet an appliance outlet.
4. Extends to every customer the same low rate for energy—4 cents for lighting and other use over 5 kilowatt hours per month and a 3 cent rate in excess of 200 kilowatt hours per month.

P.U.R.1928E.

COLORADO PUBLIC UTILITIES COMMISSION.**CITY OF CRIPPLE CREEK**

v.

CRIPPLE CREEK WATER COMPANY.

[Case No. 330, Decision No. 1878.]

Service — Right to discontinue — Fire hydrants.

1. A city should not be required to continue to rent a number of fire hydrants which have become unnecessary by reason of a reduction of population and property hazards, notwithstanding the fact that a discontinuance of such rentals might so lower the available return as to make necessary a rate increase, p. 393.

Rates — Procedure — Evidence for reduction.

2. No reduction will be made in the rates of a utility unless there is ample evidence before the Commission that will permit of a reasonable determination as to the advisability of such action, p. 393.

[August 27, 1928.]

COMPLAINT by a city for a reduction in the number of fire hydrants rented and a reduction in the rates for water service; number of hydrants reduced and a reduction in rates denied.

Appearances: E. B. Upton, Cripple Creek, attorney for the city of Cripple Creek; Page M. Brereton, Denver, attorney for the Cripple Creek Water Company.

By the **Commission:** On October 26, 1927, the city of Cripple Creek, Colorado, filed a complaint in which allegations were made as to the marked and rapid decrease of the population of said city, the wrecking and removal of many of the residences and business houses of the city and the marked decrease of the assessed valuation of the property therein.

The complaint further alleged that by virtue of the decreased valuation of property the revenue of the city had decreased in even greater proportion; that the outstanding bonded indebtedness of the city was \$78,000, although the assessed valuation is only slightly over \$500,000; that the city, because of the decrease in number of buildings needing fire protection, no longer has use for some thirty fire hydrants; that the rate is excessive in comparison with rates in other cities and that the city is not able to pay the existing fire hydrant rental. The complaint
P.U.R.1928E.

alleges also that the city is unable to operate and continue paying the excessive rental; that negotiations had been conducted with the defendant for the purpose of securing a reduction in the fire hydrant rentals and that no success had resulted from said negotiations.

The complaint concluded with a prayer that this Commission investigate the rates and charges of the defendant for hydrant rentals and reduce such charges to a reasonable rate effective July 1, 1927, and for such other relief as may be proper in the premises. On November 14, 1927, the Cripple Creek Water Company, defendant, filed its answer in which it admitted a number of allegations of the complaint. It denied, however, that the complainant is not able to raise sufficient revenue to pay its obligations and operating expenses and that the rate of the fire hydrant rental heretofore fixed by the Commission is excessive considering the valuation and operating expenses of the defendant. The defendant admitted that the needs of the city of Cripple Creek are less than when the population was larger, but alleges that it was induced to invest its capital in its plant for the purpose of supplying a demand which was actual and reasonable when the investment was made and that the defendant is not in any way responsible for reduction of the demand and should not, therefore, be penalized for it.

It denied that the present fire hydrant rental is excessive and that the complainant is unable to pay the same. It alleges that in 1926 the defendant sustained an operating loss of \$434.33 and that with the best and most economical management the system cannot pay a fair return on the investment even at present rates. It then asks that the complaint be dismissed.

The case was set for hearing and was heard in the hearing room of the Commission on July 17, 1928. The evidence showed without any contradiction that the reductions in population, in assessed valuation and the number of building in the city of Cripple Creek in the past twenty years has been very great and that the city is wrestling with a very difficult problem in meeting its obligations. The evidence further showed the city's bonded indebtedness is \$78,000 as alleged in the complaint. A recital of the details of the evidence as to the loss of population,
P.U.R.1928E.

the number of houses wrecked, the stringent financial condition of the city, etc., would serve no useful purpose. It may be stated, however, that at the present time the population appears to be some 1900 and that in a period of slightly over three years ending June 27, 1928, 80 wrecking permits have been granted pursuant to which buildings had been wrecked. The original bonded indebtedness of the city created in 1916 to pay city warrants has been reduced by only \$2,000 in the years 1925, 1926, and 1927. All of the said bonded indebtedness amounting to \$78,000 matures in the year 1931.

In Case No. 31, the decision in which was entered on March 25, 1916, 2 Colo. P. U. C. 55, P.U.R.1916C, 788, the Commission fixed the total valuation of the property of the defendant used and useful for serving the city of Cripple Creek at \$150,000. In that case the Commission allowed a reduction of the number of fire hydrants to be left in service in said city to 100 and fixed the annual charge of each hydrant at \$52.50. In accordance with this order the city council of the city of Cripple Creek designated 100 hydrants which the city desired to retain.

There are two questions raised and requiring decision. One is whether the number of the hydrants should be reduced and if so to what extent. The other is whether the rental per hydrant should be decreased.

The evidence was convincing and undisputed that in view of the number of houses now in Cripple Creek, 65 hydrants are ample to afford to the city protection against fire. The Commission attaches hereto and makes as a part hereof, Exhibit "A" showing the location of the 65 hydrants which the city reasonably needs to have retained. Those not included in this statement are the ones which the Commission finds are no longer necessary.

The Commission had anticipated, after its engineer had in company with an engineer of the Mountain States Inspection Bureau, made a report tending to support the allegations that a large number of the hydrants are no longer necessary, that the defendant herein might ask to have broadened the issues so as to raise the question of the reasonableness of the rates on the remaining hydrants and probably to the individual consumers
P.U.R.1928E.

residing in the city. However, no such broadening of the issues was attempted or requested.

The financial statement introduced in evidence and based upon the annual reports of the defendant for the years 1916 to 1927 show very substantial profits for the years 1916, 1917, and 1918. The profits shown are arrived at after deducting for depreciation during each of those years some \$4,300 or \$4,400 in excess of the amount allowed in said Case No. 31, *supra*, to be reduced. The profits include three very substantial items, one for each of the three years, totaling some \$32,000. These items appear opposite the words: "Add—Other Income." If this other income was derived from property included in the used and useful property on which the Commission in that case made a valuation, it should be taken into consideration in arriving at the net profits from the property valuation of \$150,000. If it was derived from other property not included in that valuation, it should be disregarded. The evidence does not show that it was derived from property not included in that valuation, and, so far as the Commission knows, the company has no other property from which any substantial revenue could be derived. The defendant testified that the reason for its showing a depreciation greatly in excess of that allowed by this Commission is that the Federal Government allows the greater depreciation in arriving at the amount of income tax to be paid by the defendant.

The total taxes shown by the reports of the defendant to have been paid during the 12-year period, 1916–1927 total \$81,272.32. The evidence produced by the complainant shows that the taxes paid in Teller county during that period amount to \$71,153.95 making a difference of \$10,118.37. The complainant admits that probably the company's report properly includes an annual corporation flat tax amounting to \$660 for the twelve years. This would leave a difference of \$9,458.37. One item which received considerable attention at the hearing is the taxes shown by the annual report for the year 1921. This report shows the amount thereof to have been \$12,750.07. The taxes for the preceding year were \$6,360.57 and those for the succeeding year are \$6,526.73. The secretary of the defendant was of the opinion that this greatly increased amount for the year 1921
P.U.R.1928E.

was due to some change in bookkeeping or a change made in the fiscal year of the company. He was given leave to mail to the Commission any further information which he might have bearing on this item, but to date no information has been received. In view of the fact that a normal amount of taxes seems to have been paid in both the preceding and succeeding years it is hard to understand this very large item appearing in the report for the year 1921. Even though this amount is excessive by some \$6,000, we do not understand how the difference between the taxes shown by the records of Teller county to have been paid and those as shown by the annual reports could amount to more than \$9,000, as the taxes stated in the annual reports for the various years are all in odd amounts and with two exceptions for an odd number of cents. Assuming, however, that the taxes paid are less by \$9,458.37 than the total amount as shown by the annual reports for the years 1916 to 1927 inclusive, and that the depreciation deducted had been \$2,500 per year, the authorized amount, instead of the amounts that are shown by the reports to have been deducted, the total income for the 12-year period is \$113,981.02. A return of 7 per cent on \$150,000 for the period in question would amount to \$126,000. However, this does not tell the whole story. Beginning with the year 1919 the income of the defendant has been so greatly lower than the income for the years 1916 to 1918 inclusive that it cannot be at all comparable with the 3-year period, 1916-1918.

We find that the total income for the 6-year period, 1922 to 1927 inclusive, allowing a deduction of only \$2,500 yearly for depreciation, is \$24,798.38. While this is an average for the six years of a little over \$4,000, the first year of the period, 1922, shows a much larger profit than any of the succeeding years. The profit for that year was \$6,245.06. For the 6-year period the net return per year on \$150,000 is .0275 plus. The profit for the year 1927 is \$3,357.20. The elimination of 35 hydrants on which the defendant is receiving a commission-fixed rate of \$52.50 will reduce the gross income of the defendant \$1,837.50.

In spite of these figures, the city of Cripple Creek argues that the Commission should not only order the elimination of 35 P.U.R.1928E.

hydrants but should reduce the rates paid by the city on the remaining 65. The next to the last paragraph of the brief submitted by the city reads: "Even if it be contended that the city has not in this case shown sufficient to be entitled to a reduction of the price per hydrant a year it has proven that it does not need to exceed sixty-five fire hydrants and the company has made no denial of this fact by answer or evidence, and it is to be remembered that the company has made no request or showing for any increase of rates whatsoever." This paragraph rather impliedly recognizes that although the Commission might order the elimination of the 35 hydrants it would not be warranted in reducing the rates in view of the evidence submitted. On the other hand, it should be stated that the sentence may somewhat be due to the fact that the Commission during the hearing questioned the sufficiency of the evidence to warrant a reduction in the rental.

On the contrary the defendant contends that in view of its already meager income the Commission is not justified in ordering the elimination of the 35 hydrants because such action would be an unwarranted reduction of the rates. It might be stated here that there was no evidence introduced at the hearing bearing on the present value of the property of the defendant used and useful. The evidence was confined to the financial condition of complainant and a comparison of hydrant rates with those in other cities.

[1, 2] Even though the Commission should not order the elimination of the 35 hydrants we would not feel justified on the evidence introduced in this case, in spite of the very serious situation of the city, with which the Commission fully sympathises, in reducing rates. What the evidence might show in another hearing on the rates should be we do not, of course, express any opinion. But assuming that the defendant is entitled to all of the gross income which it is now receiving and conceivably to more, we are of the opinion and so find that it is contrary to good economics, to require the city to pay for the maintenance and up-keep of 35 hydrants which are no longer necessary. The Commission is of the opinion that they should be disconnected and sold for such value as they may have. If

P.U.R.1928E.

they have no second-hand value it would be better to disconnect them and relieve the city of the cost of maintenance and up-keep. No evidence was submitted bearing on the question of the value of the hydrants, the cost of removal, the maintenance, up-keep, etc., but we are of the opinion, in the absence of any showing to the contrary, that it is not in accord with sound business principles to continue them in use though the net loss by reason of their discontinuance and possible sale might have to be made up in some other manner.

The Commission is, therefore, of the opinion and so finds that the public convenience and necessity does not longer require the maintenance of the 35 hydrants not included in Exhibit "A." The complainant asks for an order effective July 1, 1927. No hydrant rental whatever has been paid by the city for the period beginning July 1 to date. While the evidence does not show very clearly, if at all, how the situation prior to March 21, 1928, the date of the report made to the Commission by its engineer, compared with the situation at that time, we believe it is fairly inferable that the condition was substantially the same on October 26, 1927, the date of the filing of the complaint, as it was in March and at the time of the hearing. We believe it fair, therefore, to and we do find, that the public convenience and necessity did not require the 35 hydrants in question on and after October 26, 1927, and that the city should be relieved of payment of rental therefor from that date. The ground of making our order effective as of October 26, 1927, is that the rights of the complainant should be determined as of the date of the filing of the complaint. We doubt the propriety of relieving the city of the payment of the rental on those hydrants prior to the date of the filing of its complaint even though for a few months prior thereto it was engaged in good faith in what resulted in a fruitless attempt to settle the matter without recourse to this Commission.

The defendant on page 8 of its typewritten brief, in support of its argument that in view of the evidence before the Commission it would not be warranted in making a reduction of either the hydrant rentals or the number of hydrants (because the latter course would reduce the total income of the defendant) cited Ohio & C. Smelting & Refining Co. v. Public Utilities P.U.R.1928E.

Commission, 68 Colo. 137, P.U.R.1920D, 197, 187 Pac. 1082. We call attention to this citation because on pages 8 and 9 of that brief a certain portion of the opinion of the court in the case cited is quoted which might indicate that the Commission on its own motion should have made a thorough examination and valuation of the property of the defendant. In the case cited it appeared that this Commission had ordered reduced a rate which was being paid to the Colorado Power Company under a contract entered into with a private corporation, without having established a reasonable value of the property of the power company either as a whole or of the local plant in Salida as a part thereof. The court pointed out that the Commission could not be lawfully excused for this failure and that it is not like a court to consider and determine only that which is brought before it. It further pointed out that one of the duties of the Commission is to investigate and determine in the interests of the state.

However, on page 9 of the brief the defendant stated: ". . . but we respectfully submit that the Commission is not called upon to do this by the complaint or pleadings filed here, and that no good could result to the city and perhaps no good could result to the company, by taking such action."

The complainant cites the same case on page 6 of its brief and suggests that in some other hearing of a different nature "there could be many matters and facts to consider not relevant or pertinent to this hearing." It states also on the same page of its brief "However for the present purpose that is unnecessary." The case is cited again in the brief of the complainant on page 8, but the citation is in connection with and in support of an argument that the Commission should judge fairness of rates in view of the financial ability, etc., of the city as distinguished from and without regard to the consideration of the value of the investment of the utility.

Irrespective of whether the Commission itself on its own motion and through its engineering force should have made the necessary examination, study and valuation of the refining company's system, the fact remained in that case that until it did have the evidence before it of such valuation it could not lawfully increase the rate being paid by the customer. In the case P.U.R.1928E.

now before the Commission we are not reducing any rate. We are simply holding that even though the elimination of some of the hydrants might conceivably entitle the defendant to higher rates, any loss of revenue should, if necessary, be made up by securing higher rates instead of forcing the city to pay a return on the investment in and the up-keep and maintenance of the unnecessary hydrants. The Commission has stood ready in this case to conduct a rate hearing in which evidence of a valuation should come before it but the defendant has expressly stated that it is not necessary. The complainant has joined in this position.

Moreover, in addition to the fact that the parties themselves have not seen fit to submit the case on any evidence bearing on the present value of the system, it might be stated that the engineering force of the Commission is limited and that it has been otherwise engaged since the filing of the complaint, and that the Commission has not thought it advisable in view of other work which the engineering force has been compelled to give attention to, to order its force to take the large amount of time necessary to make a complete survey of the system and a valuation thereof.

MONTANA PUBLIC SERVICE COMMISSION.

RE UNION ELECTRIC COMPANY.

[Docket No. 937-A, Report & Order No. 1518.]

Valuation — Estimate of utility's engineer — Reproduction cost.

1. A base valuation on the physical properties of an electric company by a utility's engineer excluding overheads was accepted as correct where the total was less than the amount reached by the Commission's engineer, p. 401.

Valuation — Engineering and superintendence — Electric utility.

2. An allowance of 5 per cent was made for engineering and superintendence in obtaining the reproduction estimate of an electric utility, p. 401.

Valuation — Interest during construction — Electric utility.

3. An allowance of 4 per cent overhead was made for interest during construction in the reproduction estimate of an electric utility, p. 401.

P.U.R.1928E.

Valuation — Omissions and contingencies — Electric utility.

4. An allowance of 2 per cent was made as the overhead cost for omissions and contingencies in reproducing an electric plant for rate-making purposes, p. 401.

Valuation — Insurance during construction — Electric utility.

5. An allowance of 1 per cent was made as the overhead cost of insurance during construction to obtain the reproduction cost of an electric utility, p. 401.

Valuation — Organization and legal expense during construction.

6. An allowance of 3 per cent was made as the overhead cost of organization and legal expense during construction to obtain the reproduction estimate of an electric utility, p. 401.

Valuation — Taxes during construction — Electric utility.

7. No allowance is made in obtaining a reproduction estimate of an electric utility for taxes during construction where the property sought to be valued could be reproduced within the period of a year between the annual tax due dates, p. 401.

Valuation — Hauling and labor maintenance during construction.

8. A special allowance of 1.5 per cent was permitted for hauling material and maintaining labor camps during construction of a plant so remotely situated that such expenses were necessary in the reproduction cost, p. 401.

Valuation — Overhead construction cost — Reproduction value.

9. All proper costs during construction should be grouped under an allowance for overhead costs in a reproduction appraisal of utility property, p. 403.

Valuation — Unnecessary construction cost — Certificate.

10. No allowance was made in the overhead construction cost for the expense of securing a certificate which was unnecessary for the lawful operation of the utility valued, p. 403.

Valuation — Overhead construction — Promotion fees.

11. Promotion fees were not allowed in valuing the overhead construction cost of a utility, because of their conjectural and speculative nature, p. 403.

Valuation — Going value — Good will.

12. Reported decisions holding that good will should not be taken as an element of going concern value were taken as indicating the accepted rule on that point, p. 404.

Valuation — Necessity for going value allowance.

13. The necessity of an allowance for going concern value in the appraisal of utility property for rate making was held to be the established rule, p. 404.

Valuation — Going value — Percentage basis.

14. The computation of going concern value by using as a basis a percentage of the physical value of utility property was held to be indefensible, p. 404.

Valuation — Overhead allowance as including going value.

15. No additional sum should be allowed for going concern value where the property has been valued on the basis of reproduction cost new, less depreciation, and the items of organization and other pioneer expenses have been included in a general allowance for overhead construction costs, p. 404.

Valuation — Definition of working capital.

16. Cash working capital is the amount measuring the operating requirements of the utility in meeting its current obligations over and above that furnished it immediately from current revenues, p. 407.

Valuation — Working capital — One month's operating expenses.

17. An electric utility being paid for its services in the ordinary course of business on or about the first day of the month succeeding the month in which they were rendered was held not to require an allowance for cash working capital in excess of one month's operating expenses, p. 407.

Depreciation — Necessity for allowance — Weight of authority.

18. The theory that depreciation in a well-maintained or alleged 100 per cent efficient utility property is nonexistent was held to be in irreconcilable conflict with the great weight of authority, p. 408.

Depreciation — Reserve balance as measure of accrued depreciation.

19. The balance in a utility's depreciation reserve was not taken as an indication of the accrued depreciation where it was intended only as a theoretical estimate, where nothing was paid into the account for a considerable period, and where a large portion of the property had begun to function in a second-hand condition, p. 416.

Valuation — Ascertainment — Comparisons with tax valuation.

20. A valuation for tax purposes claimed by an electric utility was disregarded by the Commission in a valuation for rate-making purposes, p. 418.

Depreciation — Theoretical and actual depreciation — Inspection by engineers.

Discussion as to the distinction between theoretical and actual depreciation intended to be drawn by leading decisions from the United States Supreme Court and other tribunals holding that physical inspection of property is necessary, p. 414.

[August 25, 1928.]

APPLICATION of an electric utility for valuation of its property; valuation findings made in accordance with opinion.

Appearances: Fred W. Hassan, Boise, L. K. Adams, Vice President and Manager, Union Electric Company, Dillon, and E. G. Toomey, Helena, for the Union Electric Company; T. F. McFadden, of the firm of Gilbert and McFadden for the city of P.U.R.1928E.

Dillen, Dillon; Fred E. Buck; Chief Engineer and Francis A. Silver, Counsel, for the Commission.

By the Commission: On April 12, 1926, the Commission published Report and Order No. 1449 in Docket No. 937, an investigation instituted by the Commission, upon its initial motion, into the reasonableness of the rates of the Union Electric Company. By the terms of said Report and Order, the Union Electric Company (hereinafter called utility) was required to put into effect a reduced schedule of rates. The decision of the Commission in Docket No. 937 was preceded by a public hearing at which a valuation of the physical property of the utility was submitted by the chief engineer of the Commission. The valuation was based upon a field inventory and appraisal. The utility offered no evidence upon the question of the value of its properties and entered no objection to a reduction in rates. Subsequent to the public hearing but before the promulgation of Report and Order No. 1449, a brief was filed by the utility criticising our engineer's valuation. No petition for rehearing was filed and the Commission made its order upon the basis of the record before it. On November 8, 1926, the utility filed with the Commission an application for a hearing upon the subject of valuation only. The application was granted and a public hearing was held at Helena on November 20, 1926, at which time the utility submitted an expert's appraisal of its property. The utility's valuation was at considerable variance with the report and appraisal submitted at the original hearing so a recheck of the property by our engineer was ordered. Upon receipt of the recheck figures, the utility was furnished a copy thereof and the opportunity given it to ask for a public hearing thereon. The utility availed itself of the opportunity and final hearing was had upon the subject at Helena on May 28, 1928.

The original valuation and the recheck of our engineer as well as the appraisal submitted by the witness Hassan for the utility are all submitted upon the basis of reproduction cost new less depreciation. We have summarized the respective valuations in the following table:

P.U.R.1928E.

	Hassan June, 1926	Buck (Original) March, 1926	Buck (Revised) March, 1926
Intangibles	\$12,300.00	\$ 0.00(x)	\$ 0.00(x)
Water rights	9,900.00	10,000.00	10,000.00
Land	594.50	443.00	443.00
Buildings	11,265.00	6,152.40	9,279.60
Dam and reservoir	6,468.45	2,208.20	6,487.00
Pipe line	14,560.63	9,057.75	14,751.35
Power plant (upper)	40,101.78	15,469.25	39,962.37
Power plant (lower)	25,340.77	0.00(y)	0.00(y)
Substation (Kentucky ave- nue)	4,588.09	0.00(z)	4,588.09
Transmission line	9,804.73	11,915.96	11,915.96
Distribution system	38,630.79(m)	45,610.54	45,610.54
Telephone line	1,075.81	(*)	(*)
City substation	5,881.07	19,327.00	19,327.00
Street lights	1,235.00	1,690.00	1,690.00
Office fixtures	2,573.25	1,358.00	2,573.25
Stock and supplies	2,643.81	1,424.67	1,424.67
Miscellaneous	828.75	1,109.58	1,109.58
Working capital	4,750.00	0.00(x)	0.00(x)
Interest during construction	4,578.27	0.00(x)	# (x)
Overheads	36,371.26(a)	0.00(x)	21,953.36(b)
Going concern value	20,000.00(e)	0.00(x)	0.00(x)
Totals	\$253,491.96	\$125,766.35	\$191,115.77
Depreciation	9,088.00	34,207.16	62,939.23
Present value	\$244,403.96	\$91,559.19	\$128,176.54

(x) Left open for Commission's determination.

(y) Not valued because considered not used or useful property.

(z) Omitted through misinformation as to ownership.

(a) 22½ per cent of labor and material. (b) 14 per cent of labor and material.

(*) Included in transmission line.

(c) Not submitted by Hassan but claimed by president of utility.

(#) Included in overheads.

(m) Erratum—should be \$35,888.92—see error p. 28, Hassan report.

It will be noted from the table that Hassan places the reproduction cost new of the utility's property (including all intangibles) at \$253,491.96; the actual depreciation at \$9,088, and the present value as of the date of inquiry at \$244,403.96. Buck, on the other hand, appraises the property of the utility used and useful for the convenience of the public (omitting intangibles, working capital, going concern and the lower power plant) at \$191,115.77, from which he deducts for actual depreciation the sum of \$62,939.23, leaving as the present value of the property (less the items omitted), as of the date of inquiry, at \$128,176.54. While Buck's revised figures were submitted December 6, 1927, they are based upon the prices prevailing in March, 1926. Hassan's appraisal is computed upon prices and wages prevailing on June 1, 1926. It is admitted that there

P.U.R.1928E.

existed no material difference in the level of wages or prices between the respective dates of appraisal, so that a valuation stated as of either date would be identical. Because our original decision was made on April 12, 1926, we determine the valuation arrived at herein to speak as of that date.

[1] A study of the foregoing table reveals the fact that the valuation claimed by the utility, through Hassan, for its physical property, less overheads, (excluding "working capital," "interest during construction"—claimed as a separate allowance by Hassan, but included in "overheads" by Buck—and "lower power plant," not valued by Buck) is less than the valuation placed upon it by Buck. Under these circumstances, we will accept as correct Hassan's base valuation, before overheads, of all items of physical property, excluding those just above enumerated.

Overheads.

To all labor and material prices in its inventory the utility attaches 22½ per cent to cover "field and general overheads." The percentage is distributed as follows: engineering and superintendence, 10 per cent; legal expense, 0.5 per cent; compensation, 0.25 per cent; taxes during construction, 0.25 per cent; miscellaneous, salaries, rent, storage, insurance, breakage, transfer, 10 per cent, and miscellaneous, camp equipment during construction, 1.5 per cent. The items of "organization" and "interest during construction," generally treated under overheads by this Commission are separately valued at \$10,800 (including "franchise" at \$250) and \$4,578.27, respectively.

No evidence was introduced by the utility to show that any such expenditures for overheads were actually made by the company. While we recognize that in a reproduction cost new appraisal it is necessary to set up an estimate of the costs that would be incurred as necessary overheads in reproducing the property, regardless of whether the overhead expenses actually incurred by the utility appear in the record, it nevertheless appeals to the Commission that a statement of the actual expenditures originally made would be quite helpful.

[2-8] Buck, on the other hand, in arriving at his reproduction cost,
P.U.R.1928E. 26

tion cost new applied 14 per cent to labor and material prices. In so doing he followed the precedents set by the Commission in *Re Great Falls Gas Co.* 15 M.U.R. 379, P.U.R.1922D, 385, and *Billings v. Billings Gas Co.* 17 M.U.R. 511, P.U.R.1924C, 217, where overheads were allowed as follows: engineering and superintendence, 4 per cent; interest during construction, 4 per cent; insurance, 1 per cent; omission and contingencies, 2 per cent, and organization and legal expenses, 3 per cent. Both of the cited cases concerned gas utilities and for that reason it is urged that these cases are not justifiable precedents for the instant one. We see no merit in the contention except in so far as it pertains to the item of "engineering and superintendence." We can apprehend that designing an electric utility, such as this one, involves more intricate engineering and that an allowance in excess of 4 per cent should be made, but we see no justification in the record for the allowance of 10 per cent as claimed by the utility. We believe that 5 per cent is an ample allowance for this item in this case and it will be so made. As to the other items comprising the balance of the 14 per cent, it is our opinion, based upon experience, that, in the absence of a showing of special or extraordinary conditions, they fairly cover the overheads, other than "taxes during construction" and "engineering and superintendence," allowable in an electric utility valuation. No allowance is made in this case for "taxes during construction" because it is not indicated. The plant of the Union Electric Company could easily be constructed between the first Monday in March, when the tax lien attaches, and the following March, when the property would be in function and entitled to charge the taxes payable in the following November to operating revenues. There is, however, an item in this case which is special and calls for an increase in the percentage to be applied to a portion of the utility's property. The upper power plant is located about ten miles from Dillon, where the distribution system of the utility is located and it would be necessary in the construction of this plant to incur expense in hauling material to the site and in maintaining a construction camp for the workmen. In Buck's valuation this added element of cost was taken into consideration in the unit costs applied to the material and P.U.R.1928E.

labor going into the upper power plant but it appears that the utility's appraiser did not pursue this course but applied 1.5 per cent to *all* material and labor costs. It is manifestly erroneous to apply 1.5 per cent for camp maintenance and haulage to the distribution system or to any other cost element not entering into the upper power plant. However, we are of the opinion that an allowance of 1.5 per cent is proper to cover this item when applied to the material and labor prices entering into the cost of the structures and equipment constituting the upper plant.

Organization.

[9-11] Under the heading of "Organization" Hassan has included in his valuation the following items: Incorporation fees, \$200; annual dues, \$100; legal expense, preparing and securing a certificate of convenience and necessity, \$50; preparation and issuance of capital stock, \$200 and fees of promoter and expenses in connection with the organization of the company, \$10,000, or a total of \$10,550. Under "Franchise" there appears the item "legal fees in connection with the preparation and securing of franchise, \$250."

As above indicated it has been the practice of the Commission in the treatment of the items enumerated to value them under the allowance of overheads and the present record offers no valid reason for a departure from that practice. Three per cent has been determined by the Commission as an ample allowance when applied as an overhead to cover legal organization and general expense and will be applied in this case in lieu of specific allowances. In passing, however, we observe that the charge for securing a certificate of convenience and necessity is wholly improper as it is not necessary in Montana for a utility such as the Union Electric to secure such a certificate. Nor is the propriety of the charge for "annual dues" apparent. Fees for promotion are too conjectural and speculative in an appraisal based upon the reproduction cost new theory as it cannot be assumed that any considerable amount of promotion would be necessary in the reproduction of a utility that has established itself in a community as a necessary public service.

P.U.R.1928E.

Interest During Construction.

The amount of \$4,578.27 is claimed by the utility as a proper component of the rate base for "interest during construction." In our overheads we have allowed 4 per cent to cover this item. Simple calculation will show that this percentage allowance will more than meet the utility's claim on this score.

Going Concern Value.

[12-15] The sum of \$20,000 is claimed by the utility as a fair allowance for going concern value. This amount is purely arbitrary and was arrived at by the president of the utility after he had examined some twenty court cases wherein allowances ranging from $7\frac{1}{2}$ to 25 per cent of the valuation of the property were approved. In support of the claim the manager of the utility testified that he believed the claim for a \$20,000 allowance was legitimate because of the "good feeling" existing in Dillon toward the utility by reason of the satisfactory service rendered. Obviously, the witness failed to distinguish between "good will" and "going concern value." That "good will"—indicating that element of value which inheres in the fixed and favorable consideration of customers, resulting from an established and well conducted business—has no place in the fixing of valuation for the purpose of rate making of public service corporations; has been the accepted rule since the decision of the Supreme Court in Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 48 L.R.A.(N.S.) 1134, 15 Ann. Cas. 1034. On the other hand, it is equally well established that "going concern"—indicating that value which inheres in a plant where its business is established, as distinguished from one which has yet to establish its business—is an element of value that constitutes a property right that must be considered in fixing the value of the property upon which the owner has a right to earn a fair return when his property is dedicated to a public use. Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 59 L. ed. 1244, P.U.R.1915D, 577, 35 Sup. Ct. Rep. 811. No rule of thumb or formula has been devised whereby "going concern" value can be definitely measured. In fact, a survey of the decided cases—P.U.R.1928E.

Commissions and courts—compels the conclusion that there is no uniformity in approach or in results as between Commission or as between courts. The method commonly employed by Commissions and courts in assigning a monetary value to "going concern" is to allow a certain percentage of the value attributed to physical elements comprising the utility's property. This appears to be an indefensible method and involves sheer guesswork. Having in mind the Des Moines Gas Case, *supra*, and Galveston Electric Co. v. Galveston, 258 U. S. 388, 66 L. ed. 678, P.U.R. 1922D, 159, 42 Sup. Ct. Rep. 351, cases wherein the Supreme Court of the United States affirmed the actions of the lower courts in refusing allowances for "going value" in addition to percentage allowances—12 and 13.3 per cent—of the base cost of labor and materials for overheads and expenses of organization and business management—neither of which cases have been reversed—we believe that where a utility property is valued on the basis of reproduction cost new, less depreciation, and the items of organization expenses, etc., are taken into consideration and included in a general allowance for overheads, and the subsequent business development costs are paid out of operating expenses, no additional sum should be allowed for going concern value. This view has the support of recent cases and recent pronouncements of text writers on the subject. See Hardin-Wyandot Lighting Co. v. Public Utilities Commission, 118 Ohio St. —, P.U.R. 1928D, 560, 162 N. E. 262; Portsmouth Gas Co. v. Public Utilities Commission, — Ohio —, 162 N. E. 106; Cincinnati v. Public Utilities Commission, 113 Ohio St. 259, P.U.R. 1925E, 432, 148 N. E. 817; Capital Water Co. v. Public Utilities Commission, — Idaho, —, P.U.R. 1928C, 473, 262 Pac. 863; Groninger on Public Utility Rate Making (1928) p. 84; Whitten on Valuation of Public Service Corporations, 2d Ed. Chap. XXIX; Lewis on "Going Value and Rate Valuation," article in Michigan Law Review, Vol. XXVI, May, 1928; Bemis on "Going Value in Rate Cases" in the Supreme Court, article in Columbia Law Review, Vol. XXVII, May, 1927. In the instant proceedings we have allowed 15 and 16½ per cent (this latter per cent on "upper power plant" only to cover general overheads, including expenses of organization. Under our uni-P.U.R. 1928E.

form classification of accounts such items appertaining to the cost of attaching business as advertising, soliciting, appliances, demonstrations, etc., are charged to operating expenses. Under these circumstances we feel that we are giving to the element of going concern the consideration and value that it deserves. Where the cost of attaching and developing the business has been paid by the consumers, our failure to give that fact due and proper consideration in the valuation of a utility as a going concern would have the effect of compelling consumers to pay an income on items of cost or value furnished by them.

Working Capital.

Working capital is claimed by the utility as follows: (1) Materials and supplies, \$2,643.81, and (2) Cash working capital, \$4,750.

The item of material and supplies was arrived at by actual count of the material and supplies on hand May 29, 1926. It exceeds the amount allowed by Buck by \$1219.14. Buck's figure is also based upon actual inventory, made about two months previous. The difference can perhaps be accounted for by an increase in the stock on hand between the respective dates of inventory. From the annual report filed with the Commission by the utility for the calendar year 1925, it appears that on December 31, 1925, the utility had on hand material and supplies in the amount of \$978.42. This figure, compiled at inventory time, doubtless reflects the low point of the year. On the other hand, the amount on hand at the time of the Hassan appraisal appears excessive, especially in view of the fact that the utility is purchasing a considerable portion of its electrical energy from the Montana Power Company. On the whole, it appears that an allowance of \$1800 for materials and supplies will adequately meet the requirements of the utility and we, therefore, allow that sum.

The sum of \$4750 was fixed by Hassan upon the assumption that the utility is required to render one month's full service before its customers are billed for same and that an additional thirty days expire before the money derived from customer accounts is entirely available to meet operating needs. On that basis he concluded that the company was, at all times, required
P.U.R.1928E.

to advance for working capital an amount not less than the equivalent of an average of two months' operating expenses, exclusive of taxes and depreciation.

[16] Cash working capital is the amount of money measuring the operating requirements of the utility in meeting its current bills and obligations over and above that furnished it immediately from the sale of its service. In other words, it is the sum of money necessary "to bridge the gap between outlay and reimbursement." There can be no question about the propriety of including it in the rate base.

[17] The utility pays a rental of \$500 per month to the Beaverhead Transmission Company for the rental of its line. For power purchased from the Montana Power Company it disburses monthly about \$730. Monthly salaries total \$875 and a fair allowance for miscellaneous would be \$395. Thus the monthly outlay of the utility is approximately \$2500, excluding taxes and depreciation. There is no evidence in the record from which we can infer that any of the above items of operating expense are paid for in advance. In the ordinary course of business they would be paid for on or about the first of the month succeeding the month in which they were incurred. We are unable to see how, under any ordinary system of conducting business, the utility needs an amount in excess of one month's operating expense to enable it to meet all of its matured obligations. Accordingly we will pass the sum of \$2500 into the rate base to cover the item of cash working capital.

Lower Power Plant.

In our Report and Order No. 1449, we eliminated the property designated as the "lower power plant" upon the showing that it was not in fact used as a standby or in condition to be readily made available for such purpose. We are by statute invested with the power to "investigate and ascertain the value of the property of every public utility *actually* used and useful for the convenience of the public." (Section 3884, Revised Codes of Montana, 1921). It is clear that under the record as made we must adhere to our original decision and exclude the lower P.U.R.1928E.

power plant from this valuation as not being property actually used or useful for the convenience of the public.

Lovell Right-of-Way.

In addition to the claim of \$9,900 for water rights the utility sets up in its valuation the arbitrary sum of \$1,500 as the capitalized value of its right-of-way appurtenant to its upper power plant. From the record it appears that the utility secured its power site, the right to use water from a warm spring for power purposes, and rights-of-way for its pipe line, its pole line, and a roadway from the Lovell Live Stock Company, in consideration of the utility's agreement to perpetually furnish electric light current for fifteen 16-candle power incandescent electric lights to buildings on the Lovell ranch and to supply water for domestic and lawn irrigation purposes to said ranch. The cost of furnishing and maintaining this service to the Lovell ranch is charged to operating expense, and, as we understand the record, the poles and wire used in this service are included in the inventory and appraisal submitted. These rights-of-way together with the power plant site and water rights have been continuously carried on the books of the company at the sum of \$10,000, which is the sum allowed by Buck in his valuation. We think that this amount, under this record, is a fair valuation and we decline to allow an additional sum of \$1,500.

Depreciation.

[18] In considering the amount of depreciation that should be deducted from reproduction cost new to arrive at the value of the utility's plant at date of inquiry we are met with the contention that inasmuch as the utility is rendering service at 100 per cent efficiency, there should be no deduction for depreciation. This same theory was suggested to and rejected by the Commission in the Great Falls Gas case, *supra*, as being unsound. The theory that depreciation in a well-maintained utility property is non-existent is in irreconcilable conflict with the leading cases in the United States Supreme Court (*Knoxville v. Knoxville Water Co.* 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; *Minnesota Rate Cases*, 230 U. S. 352, 57 L. ed. 1511, 33 Sup. Ct. P.U.R.1928E.

Rep. 729, 48 L.R.A.(N.S.) 1151, Ann. Cas. 1916A, 18), the findings of the Interstate Commerce Commission (Texas Midland Railroad, 75 Inters. Com. Rep. 1), the established judgments of engineering and economic authorities (Bonbright on "Depreciation and Valuation for Rate Control," Columbia Law Review Vol. XXVII, No. 2, page 113; Whitten, *Valuation of Public Service Corporations*, 2d Ed. § 828) and the practice of the State Commissions generally. (Re Milwaukee (Wis.) P.U.R.1927B, 229; Buck v. International R. Co. (N. Y.) P.U.R.1926D, 665; Re Chesapeake & P. Teleph. Co. (Va.) P.U.R.1926E, 481; Re Mandan Electric Co. (N. D.) P.U.R. 1925D, 508; Re Indianapolis Water Co. (Ind.) P.U.R.1923D, 449).

Our attention is directed to Re Idaho Power Co. P.U.R. 1924C, 731, 739, where the Idaho Commission stated "Its properties are in 100 per cent service condition and nothing will be deducted for *theoretical* depreciation." We are not disposed to quarrel with that statement, but that the Idaho Commission does not subscribe to the views herein urged by Hassan is evident from its decision in Re Boise Water Co. P.U.R.1926D, 321, 346, decided May 13, 1926, some twenty-nine months after the Idaho Power case, wherein it had before it the exact contention that is before us. To quote from the decision:

"The attorney for the Boise Water Company contends that as this utility property is rendering service at 100 per cent efficiency, no consideration should be given to depreciation. While it is true that the condition of the property is such at the present time as to render service at approximately one hundred per cent efficiency, the length of time which its physical condition will enable it to go on rendering such service affects the measure of its value as an operating property.

"The condition of utility property today may be such as to enable it to render service at approximately one hundred per cent, but its condition tomorrow may be such that it will be unable to render such service. Where property is rendering service at approximately one hundred per cent it is self-evident that its condition is then such as to render such service. This is judging the condition of the property from the service which it is P.U.R.1928E.

rendering. Judging the physical condition of property from the service it is rendering limits the judgment based thereon to the service condition of the property at the time of the rendering of the service, and supplies little, if any, evidence upon which to base a determination as to the amount of unused service in such property. Generally speaking, operating property renders fairly good service until it stops. The results of the exhaustive condition of service in property are generally discernible before such condition is discovered, or defects in operation are noticed, before the exhaustive conditions in the property are detected.

"The contention that an item of old property is as valuable as if it were new property is untenable. Time and use demand their toll in all material things. Property new contains the full amount of service capacity. New property becomes old in time through use, wear, and decay. Use, wear, and decay lessens the service capacity of new property to the extent that time and use have exhausted such service capacity. Depreciation is measured by the extent of the lessening of the service capacity in property. Service capacity may be maintained or increased within limits by maintenance, but no matter how properly maintained, it still ages and then comes a time when its service condition is exhausted and it has to be replaced. A repaired piece of property, regardless of how skillfully the repairing may have been performed, is old property, not new, nor as good as new.

"An examination of the authorities cited is convincing that depreciation is one of the elements which must be considered in determining the fair value of utility property in connection with the reproduction cost new estimate."

It is also pertinent to note that the Idaho Power Company made the identical contention that is here made before the District Court of the United States in and for the District of Idaho in the case of Idaho Power Co. v. Thompson, constituting the Public Service Commission of Idaho, 19 F. (2d) 547, P.U.R. 1927D, 388, 435-438. The case, which involved an application to enjoin the Idaho Commission from enforcing certain electric rates, was heard before Rudkin, Circuit Judge, and Dietrich and Cushman, District Judges. The opinion was delivered by Judge Dietrich, who has since been elevated to the Circuit Court of P.U.R. 1928E.

Appeals for the Ninth Circuit. In a well-reasoned opinion the court rejected the plaintiff's theory, saying, in part:

"Plaintiff's position is that as a matter of law there should be no deduction for depreciation; or, if some allowance is to be made, it should not exceed \$438,734. Upon the other hand, one of the two witnesses testifying for defendants on the subject estimates depreciation at \$3,086,091 and the other at \$3,965,785. A problem so complex, and involving so large an amount, merits full consideration.

"In the face of its contention that we must capitalize its property at its present fair value, and must deduce such value by inquiring first what it would now cost to reproduce the property new, when we come to adjust this measure to the property as we actually find it, plaintiff urges that we should adopt the theory of value for present use. In other words, because the property is in such state of repair that it is presently capable of rendering substantially the same service as a new plant, nothing should be deducted for depreciation, regardless of its age or the deterioration of any of its parts.

"To illustrate, a pole with a normal life of ten years, costing when installed nine years ago \$25 but if now installed new, \$35 we are to capitalize at the latter value, even though it will be worthless at the end of a year. Such a view would set us adrift. Under it the original installation of a used or inferior pole could be capitalized at the same value as a new or durable one, because of its temporary serviceability. If serviceability is to be accepted as having any substantial relation to standard of value, it must be understood as meaning something more than present efficiency or utility. Durability, including cost of upkeep and the need of renewal of parts, is a vital consideration. It may be conceded that the process of depreciation is not necessarily uniform or continuous, and when it has reached a certain stage its effect upon the value of the property as a whole may be neutralized by adequate upkeep and reasonable replacement of parts. It is entirely conceivable that the accrued depreciation of plaintiff's property as a whole is no greater now than it was five years ago, and that it will be no greater five years in the future. Assuming the useful life of a pole to be ten years, if plaintiff
P.U.R.1928E.

constructed half of its line fifteen years ago and the other half ten years ago, and five years ago renewed the poles first set, and today renews the other half, it may well be said that, everything else being equal, the accrued depreciation is no greater today than it was five years ago. But as compared with construction wholly new the value of the poles must in either case be depreciated 25 per cent.

"And that is the precise question we have here; not whether plaintiff's property is worth less today than it was at some other period of its use, but whether, as it stands, it has the same fair value it would have if it were wholly new. The moment a pole is set in the ground, the process of deterioration begins. To ask us to hold that after it has been subject to such process for a period of five years, it is as valuable as a new pole, because it will give service for an additional period without replacement or reinforcement, is to urge us to set aside reason. In speaking of the general practice in respect to the transmission and distributing units of a system, one of the expert witnesses for the defendants testified that ordinarily such systems, properly maintained, depreciates from the value new to the extent of 20 or 25 per cent, and are permanently held at substantially that level by maintenance and retirements. Whether this is a precisely accurate estimate of percentage we need not determine; but the truth of the general proposition is obvious. Repairs and replacements are not made upon new lines. They are not required until deterioration has advanced to a certain stage, or, owing to lapse of time and changing conditions, a substantial measure of inadequacy or obsolescence has been wrought.

"In respect to its automobiles, plaintiff adopts a theory inconsistent with the one it urges for the balance of its property, but more in accord with reason. It computes the probable mileage of the car, and deducts from cost new in proportion to mileage already used, making reasonable allowance for scrap value. In rapidity of deterioration, to be sure, there is a difference between an automobile and some other items of plaintiff's property; but in principle they are the same, and if we compare the automobile as a unit with the plaintiff's entire system as a unit, there is close analogy. Probably a car which has run 2,000 or
P.U.R.1928E.

3,000 miles is quite as valuable for present use as a new car. Some of its parts wear out or deteriorate rapidly; as to others, depreciation, if there be any at all, is scarcely appreciable. By proper maintenance, and by seasonable renewal of parts from time to time, the life of the car as a usable instrumentality may be prolonged indefinitely.

"That some deduction must be made, we entertain no doubt. No useful purpose would be subserved by reviewing the numerous cases, and we content ourselves with the citation of Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148, and the Minnesota Rate Cases, 230 U. S. 352, 57 L. ed. 1511, 33 Sup. Ct. Rep. 729, 48 L.R.A.(N.S.) 1151, Ann. Cas. 1916A, 18.

"There remains the important process of relating the cost of the hypothetical new plant to the fair value of the old plant as it actually exists. Fair value implies a consideration of all factors which would be regarded as material in negotiating a sale and purchase of such property. Wear, decay, deterioration, obsolescence, inadequacy, and redundancy would all undoubtedly be considered as factors. It is suggested that obsolescence and inadequacy do not accrue, but occur. But in essence, how do they differ from wear and decay? In either case the process is usually gradual, and ultimate withdrawal from use of the affected unit or device is just as abrupt and just as much an occurrence in the one case as in the other. Suppose that in the progress of the art there becomes available a device which is somewhat less expensive and somewhat more efficient than the old, but that the differences are not so great as economically to justify immediate substitution. Can it be said that the value of the old is in no wise impaired by obsolescence, or that in appraising it we could fairly value it at its present cost, when that is in excess of what the new and more efficient device would cost?

"So, in respect to inadequacy, changing and growing conditions may be such as to make it appear inevitable that in a short time a unit will become inadequate and must be retired. Would it be contended that, though it may still be adequate, its fair present value could be unaffected by the fact that it must soon be scrapped? We have a concrete illustration: while asserting that P.U.R.1928E.

from the standpoint of location, design, and capacity, the plant is in good condition, plaintiff's manager testifies that it is expected business will grow to such an extent that within the next five years existing power plant units, representing an investment of \$500,000 must be retired for inadequacy. If within that short period these units must be scrapped for inadequacy, how can it be said their present fair value is greater than it would be if their physical deterioration had reached such a stage as to make their retirement necessary within the same period?

"The extent of such depreciation at any given time is often difficult to determine, but nevertheless it is quite as real as in the case of wear or decay. Hence reserves, with equalized annual accruals from operating revenue to cover such impairment of value, which takes place gradually, but is given record recognition only from time to time when the depreciation of a unit becomes so complete that it must be retired. Manifestly, if we ignore such impairment, we not only place a value upon the property which it does not in fact possess but, with accrued reserves fully covering the impairment, we capitalize that which has been constructively withdrawn from use and that for which plaintiff has been fully compensated. Chesapeake & P. Teleph. Co. v. Whitman (D. C.) 3 F. (2d) 938, P.U.R.1925D, 407."

The utility, while denying our right to deduct any depreciation under the record, contends that in any event the only amount that should be deducted is such an amount as it would be necessary to expend upon the plant to put it in "as good as new condition" which amount Hassan estimates at \$9,088. This sum was arrived at by Hassan after a personal inspection of the plant and is supposed to represent such depreciation due to wear and tear as was visible to the naked eye. He proceeds upon the theory that unless depreciation is visible it is nonexistent or at least is not deductible in a rate valuation. The Indianapolis Water Case, 272 U. S. 400, 71 L. ed. 154, P.U.R.1927A, 15, 47 Sup. Ct. Rep. 144, and Pacific Teleph. & Teleg. Co. v. Whitcomb, 12 F. (2d) 279, P.U.R.1926D, 815, 824, are cited as authority. In the former case Mr. Justice Butler, speaking for the Court said:

"The testimony of competent valuation engineers who exam-
P.U.R.1928E.

ined the property and made estimates in respect of its condition is to be preferred to mere calculations based on averages and assumed probabilities."

In the latter case, which has been affirmed upon appeal to the Supreme Court of the United States, — U. S. —, 72 L. ed. —, P.U.R.1928C, 408, 48 Sup. Ct. Rep. 223, District Judge Webster, speaking for the statutory court convened to hear an application for an injunction against an order of the Department of Public Works of the state of Washington, said:

" . . . depreciation is to be ascertained by an inspection of the property—by going and looking at it and making estimates based upon the facts which such examination discloses."

We do not read the Indianapolis Water Case, *supra*, nor the Pacific Telephone & Telegraph Case, *supra*, nor any of the cases cited in either decision as upholding the view that actual depreciation not visible to the naked eye upon an inspection of the property is to be wholly ignored. What they hold in effect, as we view them, is that actual depreciation and not theoretical depreciation is to be deducted and that in arriving at the deduction recourse must be had to opinion based upon contemporary investigation.

Buck estimates the actual depreciation existing in the utility's plant, based upon his reproduction cost new, at \$62,939.23. This calculation is the result of a personal inspection of the property. He made no study of the maintenance accounts of the utility to determine how much repairs had actually been made to the various units of the property, and his failure to do so is criticised by the utility. It introduces an exhibit compiled from its records showing that between 1914 and 1926 inclusive there was expended in maintenance upon its plant the sum of \$27,646.04, segregated among its various units as follows: Power plant equipment, \$6,533.36; dams, canals and flumes, \$7,418.11; power plant buildings and fixtures, \$1,064.70; turbines and water wheels, \$195.25; distribution system, \$9,258.39; transformers, \$118.54; meters, \$2,019.10; general office equipment, \$108.35; buildings, fixtures and grounds, \$628.10; and office building fixtures, \$304.84. During the same period it spent on property replacement the sum of \$20,841.73, making P.U.R.1928E.

the combined maintenance and replacement expenditures, \$48,127.77. These expenditures merit consideration and will be considered in connection with the computation of existing depreciation.

[19] Between 1912 and January 1, 1926, the utility paid into its depreciation reserve fund the sum of \$44,200. On December 31, 1925, according to its annual report to the Commission, its balance to depreciation reserve account was \$24,570.85. This sum we do not take as measuring its actual depreciation on December 31, 1925, nor in arriving at actual depreciation as of date of inquiry are we influenced by it. There are several reasons why the balance in the utility's depreciation reserve must not be taken even as indicia of depreciation. First, the depreciation reserve account is set up under our uniform classification of accounts system as the "estimated annual depreciation of the tangible capital in service of the utility," and we are here concerned with *actual* existing depreciation. Secondly, from the year of the utility's organization, 1908 to 1913, nothing was paid into the depreciation reserve account, although time and wear and tear were exacting their toll during that period. Thirdly, a large portion of the property of the utility at the time it began to function was second-hand, having been acquired from two competing electric utilities who passed out of the picture upon the entry into the field of the Union Electric Company.

Buck finds from his personal inspection of the plant that depreciation existing in the various items of property ranges from 0.0 per cent in the case of the Kentucky avenue sub-station to 90 per cent in the instance of unit No. 1, installed in the upper power plant. This unit is now over twenty-five years of age and according to Buck is obsolete. The utility on the other hand makes a showing that this unit has been practically rebuilt in all of its major parts and that in 1923 it was tested by a Westinghouse engineer and rated as 97 per cent efficient. It is conceded that this particular type of unit is not being manufactured any more. In 1923 the utility installed unit No. 2, which has not been in use since 1925, but which is included in this valuation, as a standby unit. We are of the opinion, in view of the maintenance expended upon unit No. 1 and its present operating effi-

cieney that it should not be depreciated in excess of 45 per cent. In 1922 the utility made a systematic examination of its meters, replacing the meter parts that were worn out and repairing those in need of repair. In the same year a sum equal to about three times the average yearly maintenance on the distribution system was spent. Between 1920 and 1923, inclusive, property replacements to the extent of about \$10,000 were made. Having a due regard to the records of the company showing maintenance and replacements, the testimony of Hassan as to the amount necessary to restore the property to "as good as new condition" and the report of Buck we conclude that the existing actual depreciation in the depreciable property of the utility used and useful in the public service is not less than \$40,055, which sum we will deduct from the reproduction cost new to arrive at the fair value of the plant.

In order to show the excess earning or loss of the utility over the Commission's annual depreciation factor of 3.93 per cent and an 8 per cent annual return, Hassan makes an analysis of the income of the utility from its organization in 1908 to December 31, 1926. To arrive at some base as to the value of the property in 1908 Hassan takes Buck's valuation of \$191,115 and deducts therefrom the additions made between 1908 and 1925 inclusive. Having arrived at a value of the property in 1908, he applies the annual depreciation factor and a rate of return of 8 per cent to show the amount that the utility should have earned over and above operating expenses and taxes and against this he set forth what the net earnings of the utility were before depreciation and rate of return. This method he pursues for each year up to 1926, setting up a tabulation showing that from 1908 to 1913 the utility suffered losses over depreciation and return ranging from one thousand to approximately ten thousand dollars. From 1915 to 1925 there appears a gain in each year from \$273 to \$8161, the final result being that for the period of 1908 to 1926 there was an excess gain over depreciation and return of \$14,050. Hassan frankly admits that his basis of computation is open to legitimate criticism. Buck's figure of \$191,115 entirely omits the lower power plant as well as working

P.U.R.1928E.

capital and certain intangibles. Further, his figure is cost of reproduction cost new based upon prices prevailing in March, 1926, which prices are at variance with the price levels obtaining between 1908 and 1925. However, giving due recognition to the weaknesses of the tabulation the implication is clear that the utility, on the whole, has enjoyed a successful financial history.

The following table summarizes our findings as to the reproduction cost, overheads, depreciation, and present value of all depreciable property employed by the utility and used and useful in the public service: [Table omitted.]

Adding to the present value of the utility's depreciable property the sum of \$10,000 for water rights, etc.; \$594.50 for land; \$2500 for cash working capital, and \$1800 for material and supplies, we arrive at the sum of \$130,895.30, which sum we find to be the value of the Union Electric Company's property used and useful for the convenience of the public on April 12, 1926.

Assessed Valuation.

[20] At the hearing herein our attention was directed to the fact that the utility's property return for taxation purposes in Beaverhead county and the assessor's assessment of such property is in an amount considerably less than the valuation claimed by the utility. We have disregarded its valuation for tax purposes in arriving at a valuation for rate purposes. This is in accord with our previous rulings (*Poplar v. Speed Electric Co.* 15 M. U. R. 334, P.U.R.1922B, 367; *Billings v. Billings Gas Co.* 17 M. U. R. 511, P.U.R.1924C, 217), and the decisions of the Supreme Court of the United States (*Missouri Rate Cases*, 230 U. S. 474, 57 L. ed. 1571, 33 Sup. Ct. Rep. 957).

P.U.R.1928E.

MISSOURI PUBLIC SERVICE COMMISSION.**RE UNITED RAILWAYS COMPANY OF ST. LOUIS.**

[Cases Nos. 1457, 1736.]

Valuation — Accrued depreciation — Retired property — Construction cost.

1. Retired property of a utility that has an overhead construction cost included in its original cost must carry such overhead costs along with its retiral, p. 452.

Valuation — Overhead construction cost — Property additions.

2. Utility property added since a previous valuation by the Commission should be included in the finding of fair value for subsequent rate proceedings, along with overhead construction costs actually incurred, p. 452.

Valuation — Overhead construction cost — Percentage allowed — Street railways.

3. An allowance of 5 per cent was made to cover construction overhead costs of various additions to street railway property, p. 453.

Accounting — Stand-by equipment — Emergency parts.

4. Spare parts of various equipment for a street railway company held ready to install in case of breakdowns should be included in the plant account as standy-by equipment, rather than being carried as part of materials and supplies, p. 453.

Valuation — Cost of financing — Bond discount and commissions.

5. Bond discount and commissions, in so far as they are part of interest during construction, are properly chargeable to capital account, but beyond that, the cost of financing, promoting, or assembling capital should not be included in a valuation for rate-making purposes, p. 454.

Depreciation — Necessity for reserve.

6. Utility companies are required to set aside a reserve fund for the purpose of protecting the investment in the property so that at the end of its useful life the investor will have recovered his investment, p. 454.

Valuation — Original cost — Deduction of reserve.

7. No deduction should be made from an original cost appraisal for any balance that may be in the depreciation reserve of a utility company, p. 454.

Valuation — Historical cost — Index numbers.

8. An estimate of value for rate-making proceedings of a street railway company was adopted which used an original cost, agreed upon by all parties as of a certain date, and applying cost index numbers reflecting the ratio of costs, p. 455.

Valuation — Cost index numbers — Street railways.

9. The use of a utility's cost index numbers was held to reflect more accurately the cost of property than other indexes taken from trade publications in view of the fact that they were prepared from actual costs to the company, p. 456.

Valuation — Cost index — Periodical value of American dollar.

10. Utility properties in terms of 1913 dollars were estimated in terms of 1927 currency by finding the ratio of the dollar during the latter period at 167 as compared to the dollar of 1913, p. 457.

Valuation — Reproduction cost — Estimate.

11. In computing a reproduction cost, overhead costs on a portion of utility property at book figures and on the remainder by estimate is not permissible, p. 457.

Valuation — Construction overhead costs — Nonphysical railroad property.

12. An allowance of 17½ per cent on physical utility property other than land, was permitted for construction overhead costs including cost of promotion, p. 457.

Valuation — Right of way — Street railways.

13. A method of valuing traction right of way by a city assigning to such portions adjoining rear ends of property, the average value for the rear portion of the lot and to portions adjoining the front end the average value for lots so situated was held to be more accurate and justifiable than the company's method in applying to its right-of-way holding, the average unit values indicated by general appraisal figures of similarly situated adjoining and contiguous land, p. 460.

Valuation — Unused right of way — Street railways.

14. Nonoperating land must be excluded from operating land in valuing traction right of way for rate-making purposes, p. 460.

Valuation — Right of way — Street railways.

15. It is improper to assess average lot values to a street railway's right of ways which are separated from the adjoining properties by alleys or steam railroad rights of way, p. 463.

Valuation — Right of way — Street railways.

16. The assumption of average seized lots to which shall be applied front foot values of lots varying in depth, was held to be a highly improper basis in determining the value of street railway right of way, p. 463.

Valuation — Right of way — Street railways.

17. The selling price of a contiguous lot acquired for some special purpose is not a correct measure of the value of traction right of way, p. 463.

Valuation — Right of way — Property for sale — Street railways.

18. The car-riding public should not be obliged to pay a return on property that is known to be unused at the time of the rate fixing, and property which has been advertised for sale by the company at such period will accordingly be assumed to be nonoperating property, p. 465.

Valuation — Working capital — Street railways.

19. A street railway was allowed for cash working capital an amount equal to one-half of one month's operating expenses plus materials and supplies on hand, p. 465.

Valuation — Going value — Street railways.

20. Going value is an allowance for the fact that a property with its business attached and successfully operating has a greater value than the same plant ready, but not yet operating, p. 466.

Valuation — Going value — Percentage basis.

21. Going value is wholly independent of the estimated cost of property and accordingly should not be computed on a percentage basis, p. 466.

Valuation — Going value — Amount allowed — Street railways.

22. An allowance of \$3,000,000 was made for going value of the physical property of a street railway otherwise having a reproduction cost less depreciation of \$55,712,393 giving consideration to the diminishing revenue of the company as well as the earnest efforts of the operators to stimulate patronage, p. 466.

Valuation — Reproduction and original cost.

23. Stress should not be placed on either the original or reproduction cost of utility property in ascertaining the fair value of the same, p. 467.

Valuation — Rate making — Value of service — Street railways.

24. The Commission attempted to fix a value for rate making that would keep the car rider from seeking some other means of transportation and at the same time give the company a return as nearly just as possible and still keep customers, p. 467.

Depreciation — Purpose of retirement reserve.

25. The purpose of a depreciation reserve is to retire the actual cost of the depreciable property at the end of its useful life, p. 468.

Depreciation — Amount allowed — Street railway.

26. An amount of \$800,000 was allowed for annual depreciation of street railway properties (having a fair value of \$66,000,000), p. 468.

Return — Percentage allowed — Street railway.

27. A fare increase calculated to yield a return of approximately 7.14 per cent was held not to be excessive for a street railway company, p. 471.

Depreciation — Uniformity of expenditures.

Statement that a property that has been properly operated makes its budget of expenses so that approximately the same amount will be expended each year on retirements, p. 468.

Depreciation — Latent depreciation — Annual allowance.

Discussion of consideration to be given "latent" depreciation in the computation of the annual allowance, p. 468.

[June 20, 1928.]

P.U.R.1928E.,

PETITION of street railway company for increased fares for service; granted.

I.

By the **Commission**: This cause is again brought before the Commission by application of the petitioner on June 3, 1926, asking for authority to increase the fares on its lines to 8 cents cash, two tokens for 15 cents.

A brief history of this case is as follows:

Case No. 1457 was first commenced on the 6th day of February, 1918 when the petitioner herein filed application for certain fare increases applicable to the city of St. Louis.

On March 2, 1918, the Commission issued its order holding that it had jurisdiction to abrogate the 5-cent franchise rate (5 Mo. P. S. C. R. 725, P.U.R.1918B, 815), and on May 11, 1918, 6 Mo. P. S. C. R. 67, P.U.R.1918D, 392, determined the company's value to be \$52,800,000; authorized an increase from the 5-cent franchise fare to 6 cents; and ordered its engineering and accounting departments to make an appraisal of the property and an audit of the books and records.

The authority of the Commission to prescribe higher fares to be charged by the company than specified in the franchise from the city of St. Louis was upheld by the supreme court in the case of *St. Louis v. Public Service Commission*, 276 Mo. 509, P.U.R. 1919C, 10, 207 S. W. 799.

Case No. 1736, in the matter of the petition of the United Railways Company for an increase of fares in St. Louis county, was commenced on the 4th day of September, 1918.

Rolla Wells was appointed receiver of the property on the 12th day of April, 1919, and by orders of the Commission dated May 31, 1919 and September 9, 1919, became a party as such receiver to the proceeding herein.

On August 16, 1919, said receiver filed supplemental application in Case No. 1457, for a further increase in fares applicable in the city of St. Louis.

The Commission by its order of September 9, 1919 (8 Mo. P. S. C. R. 47, P.U.R.1919F, 264, 296) consolidated these causes (Nos. 1457 and 1736) as a matter of convenience, and P.U.R.1928E.

permitted said receiver to increase fares for carrying passengers in the city and county of St. Louis as follows:

8 cents for full cash fare for adult passengers, 2 tickets for 15 cents, 7 tickets for 50 cents, 50 tickets for \$3.50, and also to increase fares charged for half-fare passengers to 4 cents per passenger, or 4 tickets for 15 cents, 14 tickets for 50 cents, 100 tickets for \$3.50.

On the 2nd day of April, 1920, the Commission by its supplemental order in the consolidated cases, prescribed lower maximum fares to be charged by the said receiver, as follows:

7 cents for adult passengers and 3 cents for half fare passengers (9 Mo. P. S. C. R. 150).

Subsequently the Commission engineers and accountants completed their appraisal and audit of the company's property as of date January 1, 1919, and after numerous hearings extending over a period of approximately one year, the Commission, on the 4th day of June, 1923, issued its order in the consolidated cases, finding the fair value as of January 1, 1919, of the United Railways Company of St. Louis, (exclusive of the Missouri Electric Railroad Company), to be the sum of \$52,838,110, of which \$1,056,762 was found to be the value of that portion of the property not used in the transportation service. (13 Mo. P. S. C. R. 522, P.U.R.1923D, 759.)

The above briefly summarizes the results of various proceedings growing out of the cases herein, prior to the present proceedings which was instituted by the petitioner, who on June 3, 1926, filed application herein for permission to increase the adult fares on its lines to 8 cents cash, 2 tokens for 15 cents.

On June 7, 1926, the city of St. Louis filed its answer in protest, and requested the Commission, before taking action, to make a full and complete audit of the books and records of the company.

On June 14, 1926, the Commission issued an order requiring its accountants to make an audit of the books and records of the company in order to determine the net additions to the property since the last audit, and to determine the operating results of the petitioner's property for the year 1925 and as many months of the year 1926 as were available.

P.U.R.1928E,

On October 23, 1926, the company filed supplemental application herein for a temporary order authorizing it to charge such rates as would allow a fair return on the said valuation as of January 1, 1919.

On October 27, 1926, the city of St. Louis filed its answer in protest to the supplemental application, and hearings were held on this application on November 16 and 17, but no action was taken by the Commission, the case awaiting completion of audit then being made.

On January 7, 1927, the company filed two tariff schedules with the Commission being P. S. C. Mo. No. 12, for the city of St. Louis, and P. S. C. Mo. No. 13, for St. Louis county. Said schedules provided for an 8-cent cash adult fare, two tokens for 15 cents, children over 5 and under 12 years of age, 3 cents.

On January 18, 1927, the city of St. Louis filed its motion for suspension of said tariffs and on February 3, 1927, they were suspended by the Commission.

On February 5, 1927, the company filed its bill of complaint in the United States District Court for the Central District of Missouri, asking for an order restraining the Commission from interfering with the collection of the rates set out in said tariffs, and on the same date, said court issued an order to show cause, and a temporary restraining order which continued in force until March 1, 1927, when terminated by order of the Federal Court.

On April 9, 1927, the company filed another amended application with the Commission asking for an 8-cent cash adult fare with no change in the rate of 3 cents for children. This application superseded the company's application filed on June 3, 1926, as well as the supplemental application filed on October 23, 1926, and the tariff schedules Nos. 12 and 13 filed January 7, 1927.

The application of April 9, 1927, states, among other things, that the value of said property, exclusive of the Missouri Electric Railroad Company, as of January 1, 1919 was fixed by order of the Commission at \$51,781,348; that the report of the Commission's accountants filed April 2, 1927, shows that the total amount of the net expenditures made for additions and betterments to said property during the period January 1, 1919, to October 31, 1926, was \$6,395,888.26; that all of said additions are used in
P.U.R.1928E.

the operation of the property; that the present fair value of the property is at least \$75,000,000, exclusive of nonoperating property; that the present value is not equal to the sum of the value as established by the Commission as of date January 1, 1919 plus the expenditures for additions since said date, but that the present value must be obtained in accordance with the rules of law as announced in the decisions of the Supreme Court of the United States, namely, the investment in the property, the amount expended in permanent improvements, present value of land, cost of constructing the plant at such prevailing prices of materials and labor as are likely to remain at the same level for a reasonable period of time, less deduction from said reproduction cost of depreciation as determined by actual inspection, plus a fair allowance for going value, working capital, consolidation, promotion, and financing.

The application further states that the net income available for return derived from the operation of the property in 1926, produced a return of only 3.31 per cent on a value of at least \$75,000,000, and only 4.27 per cent on the value as determined by the Commission as of January 1, 1919, plus the cost of additions as determined by the Commission's accountants; that the number of revenue passengers carried during the years 1923, 1924, 1925, and 1926, was respectively 292,671,000, 279,222,000, 270,105,000, and 269,555,730; and that the added revenue under the proposed rates would yield no more than an additional \$2,000,000 and thus yield an annual return on \$75,000,000, of 6 per cent.

On April 22, 1927, the city of University City filed its answer and protest.

On April 22, 1927, the city of St. Louis filed its answer and protest.

Hearings upon said amended application were held before the Commission at its office in Jefferson City, on April 22, 1927 and on May 17, 18, 19, and 20, 1927. At the conclusion of said hearings counsel for the city of St. Louis requested time to check certain evidence offered by the company, and on June 17, 1927 the city of St. Louis requested that said time be extended to at least six months, and suggested that if the Commission believed

P U.R.1928E.

action on the application should not be delayed, the Commission should fix a temporary value and such temporary rates as it considered just and proper.

On June 25, 1927, the Commission issued its report and order, permitting the company to charge and collect fares as follows:

Cash fare 8 cents per adult passenger; token fare, $7\frac{1}{2}$ cents per adult passenger, when two tokens or multiple of two is purchased; children's fare to remain unchanged at 3 cents.

Further and final hearings in this cause were held by the Commission at its hearing room in Jefferson City on February 14th to 18th inclusive, 1928.

On February 14, 1928, the St. Louis Public Service Company filed application herein for permission to intervene in this consolidated cause and to be substituted as petitioner in lieu of United Railways Company of St. Louis and its receiver.

It being shown that the St. Louis Public Service Company had by purchase succeeded to all rights and interests of United Railways Company of St. Louis and its receiver, the Commission, on February 14, 1928, ordered the St. Louis Public Service Company be granted leave to intervene in this cause. (See record of hearing February 14, 1928, page 5.)

There is more than common agreement between the company and city of St. Louis with respect to the general principles which underlie the determination of the fair value of the property. Both agree consideration must be given to original or investment cost, reproduction cost new, reproduction cost new less depreciation, working capital, going value and so-called overhead construction costs.

There is a wide difference in the amount of value as determined by the city and the company. This is due in a large measure to the relative weight accorded the pertinent items of consideration, and in the method of ascertaining these items.

II.

The Commission by its order of June 4, 1923, 13 Mo. P. S. C. R. 522, P.U.R.1923D, 759, found the fair value of the property of the United Railways Company of St. Louis (exclusive of the Missouri Electric Railway Company), as at January 1, P.U.R.192SE.

1919, considering said property as a going concern and including all elements of value, tangible and intangible, to be the sum of \$52,838,110, and the value of that portion of said property used and useful to be the sum of \$51,781,348.

The Commission's order of June 4, 1923, *supra*, was issued after extended investigations and numerous hearings which included a complete and detailed inventory and appraisal of all the physical property. This inventory and appraisal was performed by the Commission's engineering department with the assistance and co-operation of the employees of the company and required approximately three years of study.

Said inventory was agreed to, except for a few very minor items, by the company and the city of St. Louis. It was priced by the Commission engineers and company engineers on the original or investment cost basis to which all parties are in agreement.

The company's engineers also priced the same inventory on a reproduction cost new basis as of January 1, 1920.

The Commission's accounting department, in accordance with the Commission's order of June 14, 1926, made a complete and detailed study and audit of the company's books and records including a study of the additions and betterments made for the period January 1, 1919 to and including December 31, 1926. The results of this audit were reported to the Commission in reports filed April 2, 1927, and May 16, 1927 and were introduced in evidence as Commission's Exhibits Nos. 1 and 2.

The amount of the adjusted net expenditures for additions and betterments covering operating properties, for said period is as follows:

January 1, 1919 to October 31, 1926	\$6,395,888.26
November 1, 1926 to December 31, 1926	30,055.02
Total	\$6,425,943.28

Both the city and the company have made use of said audit, and property retirels and additions as shown by the working papers of the audit and covering operating property changes is as follows:

P.U.R.1928E.

Year	Property Retired	Additions and Betterments	Net Property Additions
1919	\$311,238.76	\$645,755.50	\$334,516.74
1920	279,817.26	928,139.86	648,322.60
1921	658,359.07	2,025,535.33	1,367,176.26
1922	437,498.13	1,642,049.52	1,204,551.39
1923	449,123.74	1,955,817.50	1,506,693.76
1924	361,193.89	1,196,188.53	834,994.64
1925	564,886.70	881,882.16	316,995.46
1926	419,224.90	631,917.33	212,692.43
Total	\$3,481,342.45	\$9,907,285.73	\$6,425,943.28

The company has further analyzed the above figures, separating the amounts chargeable to land. This is shown in company's Exhibits 4, and 5. The city accepts this separation and uses same in their calculations.

A statement of retirals and additions in land accounts is as follows:

Year	Retirals		Additions		
	Amt. in Land Accounts	Amt. in Land Accounts	Amt. in Land Accts. other than Land	Amt. in Land Accts. Representing Land	
1919		\$4,645.54	\$45.36	\$4,600.18	
1920		6,936.67	1,562.91	5,373.76	
1921		101,291.80	27,144.83	74,146.97	
1922		7,915.52	4,982.96	2,932.56	
1923	\$8,429.60	49,705.29	7,927.16	41,778.13	
1924		31,687.03	21,449.99	10,237.04	
1925		48,799.51	33,947.70	14,851.81	
1926		34,121.19	10,616.90	23,504.29	
Total	\$8,429.60	\$285,102.55	\$107,677.81	\$177,424.74	

The audit of the Commission's accountants did not extend to the nonoperating property of the company, only reviewing in a general way the entries made therein with respect to retirals and additions.

The Florissant Construction, Real Estate & Investment Company, a subsidiary, holds the major portion of the nonoperating property of the company.

A statement of retirals and additions to nonoperating property for the years 1919 to 1926 inclusive, is as follows:

P.U.R.1928E.

Year	Property Additions	Property Retired	Net Additions to Property
1919	\$39,406.12		\$39,406.12
1920	5,191.86		5,191.86
1921	34,545.20	\$5,985.24	28,559.96
1922	33,894.62	1,656.78	32,237.84
1923	20,558.54		20,558.54
1924	31,618.48	1,292.00	30,326.48
1925	82,875.58	4,039.36	78,836.22
1926	23,839.76		23,839.76
Total	\$271,930.16	\$12,973.38	\$258,956.78

In the audit of the Commission's accountants, there has been added to the retirels during the period 1919 to 1926 inclusive, an amount representing 15 per cent to cover general construction overheads.

In the audit of the Commission's accountants, there has been included with the additions and betterments made during the period 1919 to 1926, inclusive, the sum of \$424,629.28, said sum being the charges for power used by work trains, maintenance of work train equipment, maintenance of trucks, use of tools, store house expense and general supervision.

The company interprets this as meaning so-called construction overhead charges and takes exception to this treatment of overheads, claiming that with the exception of \$220,541 representing general supervision, all other items noted are specific construction costs and not construction overhead costs.

The report and audit of Commission's accountants also show the items of transportation of men, general office and administrative expense and interest during construction were not transferred to plant account.

The city, in the development of its estimate of reproduction cost of the property has used the accountant's report without any addition for construction overhead costs on the additions to the property since 1919.

Before tabulating the appraisals of the city of St. Louis and the company it is well to briefly show the theory and method followed by each.

Land is appraised by both the city and company on the basis of present market value for ordinary community purposes without any additions to cover consequential damages, costs to acquire or any other excess costs. Both have used the same land value in their respective original and reproduction cost estimates.
P.U.R.1928E.

The reproduction cost estimate of the company is based upon a detailed reproduction cost new appraisal as of January 1, 1920, to which construction cost index numbers (January 1, 1920—100.0) have been applied to property other than land in deriving an estimate of the cost to reproduce as of January 1, 1927.

The city's reproduction cost new estimate as of date January 1, 1927 is based on the Commission's finding of investment cost of the property except land as of January 1, 1919, to which construction cost index numbers based on the year 1913—100.0 have been applied.

The amount of depreciation is in question. The company deducts 16 per cent of the cost of fixed physical property, other than land, while the corresponding figure used by the city is 29 per cent. [Tables omitted.]

The differences in the estimates of the city and of the company are rather clearly set out in the above comparative tables. Briefly these differences are as follows:

Original Cost—Operating Property.

Total difference, disregarding deduction of balance in the depreciation reserve fund, is the sum of \$4,112,674 divided as follows:

(a) Land—Company over city	\$2,805,325
(b) Promotion, consolidation and financing—Company over city	700,000
(c) Working capital—Company over city	386,809
(d) Construction overhead costs—Company over city	220,540

The difference in item (a) Land, is due to difference in opinion of the land experts and to the fact that the city claims there should be more lands classified as nonoperating property.

Both the city and the company have attempted to follow the rule as laid down by the supreme court of finding the fair average market value of the company's land exclusive of any hypothetical costs or multipliers.

The differences lie in the application of the rule.

The values of land and right of way as found by the city and by the company are used in both their respective original cost and reproduction cost appraisals.

The company's valuation of land was obtained and the results testified to by the following men:

Mr. Fred Zeibig, a prominent realtor of St. Louis, who in
P.U.R.1928E.

conjunction with Mr. McMillan, vice president of the Mercantile Trust Company of St. Louis, appraised most of the company's land holdings, except right-of-way, in the city of St. Louis and immediately bordering the city.

Senator William E. Caulfield, a realtor in St. Louis for twenty-seven years, appraised the property adjacent to the Hodiamont right-of-way.

William H. Hasse, a real estate dealer in the city for thirty-seven years, appraised the property adjacent to the Market street and University avenue right-of-ways.

J. R. Thursby, realtor of Kirkwood, appraised the company's land holdings in that vicinity.

T. H. Heath, of the real estate department of the Webster Groves Trust Company, in conjunction with Mr. Coggeshal, manager of the real estate department of said trust company, made the appraisal of the land holdings in Webster Groves.

J. J. Bridell, a real estate dealer of Maplewood, who has been operating in the central part of the county of St. Louis for twenty-two years, appraised the land in Maplewood, Brentwood, and part of Clayton.

H. P. Kerth, manager of the real estate and loan departments of the St. Louis County Bank, and Fred J. Hollocher, vice-president of the First National Bank of Clayton and manager and vice-president of the Trust Company of St. Louis county, made joint appraisals of the company's land in Clayton and part of University City.

Edward Gocke, a real estate dealer who for twenty-two years has specialized in property along the Creve Coeur line, made the appraisal of holdings along said line.

Leonard P. Albers, realtor of Welleston and who stated he was familiar with land values in the northern section of St. Louis county, made the appraisals of company lands in Ferguson and Florissant and along the Kirkwood-Ferguson and Florissant lines.

Mr. C. W. Herald, Jr., a real estate appraiser in St. Louis, had general supervision of the company's appraisals, and appraised various miscellaneous parcels of city property.

The city's evidence with respect to land values was presented by Mr. M. H. Doyne, manager of the firm of C. E. Smith, P.U.R.1928E.

consulting engineers, St. Louis. Mr. Doyne's testimony shows he has devoted much time to the analyses and considerations affecting land values and is familiar with conditions in and around St. Louis. Mr. Doyne's qualifications are set out very fully on pages 886-890 of the transcript.

The right-of-way and land parcels now owned by the company are practically the same as appear in the appraisal as of January 1, 1919. The Commission's engineers, at that time, divided the entire property into zones and prepared maps showing all adjacent parcels in each zone. Both the company and city have used the same zoning system in their appraisals, sub-zoning any portion that has had a radical change.

Mr. Doyne has based his appraisal on actual sales in so far as obtainable, in the various communities, made one to four trips over the property, considered whether or not the right-of-way ran at the rear or front lots, considered the general topography, and on the whole has made a very complete study.

The company's appraisal of land was made by the above mentioned appraisers working under the supervision of Mr. Herald who instructed them to make their appraisal in accordance with the ruling of the Interstate Commerce Commission, and appraise the adjoining and adjacent similar property. Consideration was given to recent sales and topography. Where the lines of the company run along either the front or the rear of lots the value placed on such parcels is the value per square foot based on the front foot value of said lots. In other words, no consideration was given to the fact that certain lines run along the rear of lots and other lines along the front of lots, the average value of such lots being applied to such right-of-ways.

Lands other than right-of-way, such as the sites of power houses, substations, office buildings, etc., were actually appraised by the company's appraisers.

The city criticized the company for including in its inventory and appraisal amounts for grading of real estate parcels, claiming said grading enhanced the value and was, therefore, included twice.

The city also classified certain parcels as nonoperating where the company shows same as operating lands.

P.U.R.1928E.

The following table shows a comparison of the appraisements by the company and by the city of the various classes of land:

Appraised Value of Land as of January 1, 1927.

Right of Way Land

	City	Company
St. Louis City	\$769,837.24	\$1,612,712
Cass line	3,615.68	6,163
Hodiamond line	341,330.04	662,225
Jefferson line	6,500.00	6,500
Market line	68,200.00	204,874
Olive-University line	57,172.15	174,607
Spalding line	6,298.60	15,414
Tower Grove line	1,315.00	1,315
Loop sites	267,385.77	519,334
Cross walks	18,020.00	22,280
St. Louis County—Single Fare Area	\$283,489.56	\$509,095
City limits line	35,214.65	92,513
Kirkwood-Ferguson line—south	73,822.20	139,560
Kirkwood-Ferguson south and Olive-University lines	24,960.00	41,664
Market line	40,904.04	46,710
Olive-University line	8,929.75	27,861
Loop sites	99,658.92	160,787
St. Louis County—Outer Area	\$591,652.23	\$1,120,120
Brentwood line	23,295.96	39,350
Clayton line	86,499.35	210,880
Creve Coeur lake line	150,731.25	327,741
Florissant line	24,932.48	26,845
Kirkwood-Ferguson line—north	115,931.93	191,728
Kirkwood-Ferguson line—south	98,628.95	248,367
Meramec Highlands line	50,985.55	107,636
Loop sites	40,646.76	67,564
Total right of way land	\$1,644,979.03	\$3,341,927

Land Other than Right of Way.

St. Louis City	\$1,534,596.89	\$2,357,422
General office sites	22,340.00	23,340
Car house sites	669,079.38	1,029,886
Shop and yard sites	550,279.05	921,755
Power house sites	108,536.00	143,202
Substation sites	184,362.46	239,239
St. Louis County	\$14,942.00	\$20,869
Substation sites	14,942.00	20,869
Total land other than right of way	\$1,549,538.89	\$2,378,291

Nonoperating Land.

United Railways Company of St. Louis	\$511,061.66	\$642,183
St. Louis city	318,159.26	396,293
St. Louis county	192,902.40	245,890
Florissant Construction, R. E. & I. Company ...	\$737,856.70	\$1,150,117
St. Louis city	382,020.08	395,704
St. Louis county	344,716.62	743,293
St. Charles, Missouri	2,800.00	2,800
Chicago, Illinois	8,320.00	8,320
Total nonoperating land	\$1,248,918.36	\$1,792,300

P.U.R.1928E.

(b) Promotion, Consolidation and Financing

The company's estimate covering item (b) in its original cost appraisal of operating property is \$700,000 in excess of the city's estimate.

The Commission, in their report and order fixing the value of the company's property as of January 1, 1919, found \$2,700,000 as a fair allowance for promotion, consolidation and financing. The company adopts this amount.

The city estimates \$2,000,000, to cover promotion and consolidation. The city deducts \$700,000 from the allowance as made by the Commission for the reason that it does not believe the inclusion of costs of financing to be legally allowable and estimates such costs of financing at \$700,000.

(c) Working Capital

The company estimates, in its original cost appraisal, \$386,809 more than the city for cash working capital.

The company accepts the amounts as shown in the exhibits of the Commission's accountants which are as follows:

Cash—Average daily balance	\$743,053
Miscellaneous accounts receivable	206,583
Prepayments	<u>37,173</u>
Total	\$986,809

The city estimates \$600,000 as a fair allowance for working capital.

The city maintains that it is improper to consider miscellaneous accounts receivable and prepayments as a portion of cash working capital without a consideration of accounts payable.

Mr. Evans, auditor for the company testified that a considerable amount eventually goes into the cash account of the company from the sale of cinders, rental of property, street car advertising and sale of power.

The Commission in its 1919 valuation case estimated one half of one month's operating expenses as a fair allowance for cash working capital, and based their opinion on the fact that the company conducts a cash business.

P.U.R.1928E.

(d) Construction Overhead Costs.

The difference between the company's and the city's original cost appraisals as regards construction overhead costs is the sum of \$220,540.

The company adopts the amount of \$5,193,688, the opinion of the Commission in the 1919 valuation case, as a fair allowance. Retired and added property is not considered.

The allowance by the Commission was 15 per cent of the estimated investment in physical property other than land, plus an allowance for omissions. (See 13 Mo. P. S. C. R. 522, 610, P.U.R.1923D, 759).

The city has allowed 15 per cent of the estimated investment cost of the physical property, other than land, remaining in the 1919 inventory as of January 1, 1927. This amounts to \$4,740,700.

Both the city and company agree that 15 per cent is a fair allowance for construction overhead costs when applied to the original cost appraisal.

Original Cost—Nonoperating Property.

The total difference between the city and company appraisals for original cost of nonoperating property is the sum of \$265,703 in favor of the company.

Differences in land values accounts for \$263,757 of the total and is due to the application of the methods of appraisal of lands and to the fact that the city has included certain lands as non-operating property where the company has included the same parcels under operating property.

This is more fully discussed under land-operating property.

Reproduction Cost—Operating Property.

The total difference between the city and company estimates covering reproduction cost of operating property is \$40,034,273 in favor of the company.

The major difference is due to the method of obtaining the cost of specific construction as of January 1, 1927, of that portion of the property, other than land, remaining in the 1919 P.U.R.1928E.

inventory. Item (s) of the comparative summary of appraisals shows this difference to be \$14,134,049.

The city in making its estimate of reproduction cost used as a starting point the original cost of the property, exclusive of land and nonphysical elements, as found by the Commission as of January 1, 1919, deducted retirels and applied a cost index ratio to convert the amount to dollars as of January 1, 1927.

The company in preparing its estimate of reproduction cost, used their estimated cost of reproduction as of January 1, 1920, deducted retirels at the prices used in their 1920 appraisal and applied a cost index ratio to convert the amount to dollars as of January 1, 1927.

Other large differences in the reproduction estimates are:

(1) Construction overhead costs	\$4,374,761
(2) Observable depreciation 13 per cent	6,407,077
(3) Land value	2,805,325
(4) Working capital	386,809
(5) Going concern value	6,200,000
(6) Promotion	2,090,000
(7) Financing	4,180,000

The company, in estimating Item (1) took 17½ per cent of specific construction costs including additions made to property since January 1, 1919. The city estimated 17 per cent, and excluded all additions on the assumption that construction overhead costs are included in the book figures as taken by the Commission's accountants during their audit. The wide difference of more than \$14,000,000 in specific construction costs, accounts for the major portion of the difference in construction overhead costs.

The city offered no testimony and introduced no evidence with respect to construction overhead costs.

Mr. Bennett, testifying in support of his appraisal made for the company, stated that 17½ per cent of the cost of specific construction is a conservative allowance.

Mr. Feustel testified for the company that on the appraisal of street railway properties in Pittsburg, Philadelphia, and Baltimore, where he represented either the city or the regulatory body. 25 per cent of the cost of specific construction was the allowance made to cover undistributed construction costs plus costs of pro-P.U.R.1928E.

motion and financing, the allowance for promotion being $2\frac{1}{2}$ per cent, and for financing 5 per cent, leaving $17\frac{1}{2}$ per cent for miscellaneous and undistributed construction costs (Testimony, p. 80). Mr. Feustel, on cross examination said $17\frac{1}{2}$ per cent was a fair allowance for said costs, on the basis of present-day costs.

Mr. Richey who also testified for the company on this matter, stated that in his opinion Mr. Bennett's allowance for miscellaneous construction costs was conservative, and said that his allowance including 2 per cent for promotion, under similar circumstances, would be from 20 per cent to 24 per cent (Testimony, p. 74), and that he had made allowances elsewhere in excess of the allowance of Bennett (Testimony, p. 127).

(2) Depreciation of Physical Property.

The difference in the appraisals of the company and city relative to depreciation of the physical property is \$6,407,077.

The city found the depreciable property of the company had depreciated 29 per cent in value as of January 1, 1927. The company found the same property had depreciated 16 per cent. The large difference is due to the city applying its percentage to \$71,652,693, while the company applies 16 per cent to \$89,826,277.

The evidence introduced by the company as to the amount of existing depreciation consisted of several witnesses. Mr. Bennett, who has been valuation engineer for the company for a period of ten to fifteen years, and prepared the company's appraisal herein, testified concerning the general condition of the property. He stated that the amount of observable depreciation was based on several considerations including his personal inspections, a discussion with department heads as to the results of their inspections and their estimates of depreciation, and comparison with other properties. Bennett's estimate of the observable depreciation was 16 per cent of the fixed property other than land.

Albert S. Richey, an independent engineer, testified as to the condition of the property in general, and also, to a certain extent, in detail. He inspected 60 per cent of the track, paving, and overhead construction, 75 per cent of the power equipment, P.U.R.1928E.,

and enough cars of various types to judge the condition of rolling stock.

The result of his inspections and estimates as to existing depreciation were as follows: All depreciable property within 1 per cent of Mr. Bennett's figure of 16 per cent, power plant equipment 30 per cent, power plant buildings 10 per cent, substation 5 to 7 per cent.

Mr. Richey stated he spent a little more than three days inspecting the property of the company (Transcript May 17, 1927, p. 108).

Robert M. Feustel, an independent engineer, testified as to the condition of the property in general and in detail. He inspected 75 per cent of the company's road mileage, all the power and substations, shops, car houses, and a fair number of each type of cars.

The results of his inspections and estimates as to existing depreciation were as follows: Whole property 18 to 20 per cent, track and paving 15 per cent, overhead lines 25 per cent, power station buildings 10 per cent, power station equipment 30 per cent, substation equipment 10 per cent, substation buildings 10 per cent, shops 15 per cent, car houses 20 per cent, rolling stock 25 per cent.

Mr. Feustel stated he spent between nine and ten days during four trips to St. Louis, inspecting the property of the company (Transcript May 17, 1927, p. 128).

The testimony shows the major items of property are 497.3 miles of track, paving, and overhead trolley construction, two power plants, 25 sub-stations, general office and store buildings, car houses, shops, bridges, 78 miles of underground transmission cable, 46 miles of overhead transmission line, 1587 passenger and 210 work cars.

Carl L. Hawkins testified as to the condition of track, paving, bridges, buildings, and other structures, together with equipment used in their maintenance. He is engineer of way and structures for the company, and has charge of the construction and maintenance of these classes of property. He is of course thoroughly familiar with them.

P.U.R.1928E.

The results of his inspections and estimates as to depreciation existing as of January 1, 1927 were as follows: All way and structures 14 per cent, track 14 per cent, straight track, a little less than 14 per cent, special track (crossings, switches, sharp curves, etc.) 14.8 per cent, paving 16 per cent, roadway tools and machinery 14 per cent, bridges, culverts and drains 11 per cent, crossings, fences and signs 9 per cent, general office buildings 12 per cent, car house and shop buildings 12 per cent, stations and miscellaneous buildings 11 per cent, power station buildings 10 per cent, substation buildings 10 per cent. Mr. Hawkins also testified that with the exception of fences, the above items of property are in about the same condition as found by the Commission engineers in 1919. (Transcript May 17, 1927, pp. 218, 219). W. E. Bryan testified as to the condition of power and substation equipment and of transmission lines and distribution system. He is superintendent of power for the company and has charge of the construction, operation, and maintenance of these classes of property. He is of course thoroughly familiar with them.

The results of his inspection and estimates as to depreciation existing as of January 1, 1927 were as follows: Power station equipment 30 per cent, substation equipment 10 per cent, transmission system 10 per cent, overhead distribution cable 5 per cent, negative distribution system 5 per cent, trolley wire 25 per cent, all poles 35 per cent, wood poles 30 per cent, steel poles 25 per cent to 50 per cent, fixtures including span wires 50 per cent, power and substation equipment and transmission and distribution systems taken together 20 to 21 per cent.

Michael O'Brien testified as to the condition of cars of all kinds, automobiles and trucks, shop equipment and compressed air supply apparatus. He is master mechanic for the company and has charge of the maintenance of all these classes of property and of the operation of the shops. He is of course thoroughly familiar with all this property.

The results of his inspections and estimates as to depreciation existing as of January 1, 1927 are as follows: Passenger cars 27 per cent, ranging from 4 per cent to 42 per cent for various groups, utility cars 10 per cent, shop and garage equipment 10 P.U.R.1928E.

per cent, automobiles and trucks 15 per cent, air stations and lines 30 per cent.

The city, in making its estimate of depreciation, made a physical inspection of the property. While it did not use life tables, the various witnesses took age into consideration at the time the inspection was made; that is, age was associated with the inspection at the time the property was inspected. The dates of installation of practically every item of equipment were shown on the inventory, and the inventory, or notes made therefrom, were taken along with the men when they made their inspections. Obsolescence was taken into consideration also, in varying degrees. Allowance was also made, in the judgment of the man making the particular inspection, for the fact that in some items of machinery, such as boilers and engines, there was some depreciation known to exist, but which could not be seen. This is what is sometimes known as latent, or hidden, depreciation. Such depreciation exists, in a varying degree, in nearly all moving parts of machinery.

The company based its estimate of depreciation solely upon physical, external inspection, disregarding all other elements of depreciation.

With respect to its consideration of obsolescence, the position of the city of St. Louis as set out in its brief is as follows:

"The city, in making its estimate of depreciation, considered obsolescence only where the obsolescence was apparent in the particular item of property; that is, it did not simply apply a percentage for obsolescence to every item of property.

"The obsolescence considered was limited to the extent to which it affected the company's property for the purposes and uses to which such property is now devoted. For example, the power plant equipment, which is used as a stand-by peak load plant, was not compared with the requirements of a modern central station, but was compared to the requirements of a stand-by peak load plant. These same plants would be practically worthless for central station purposes."

Members of the firm of C. E. Smith & Company, Consulting Engineers, made the depreciation study for the city.

Benjamin F. Thomas made a personal and detailed inspec-
P.U.R.1928E.

tion and report on depreciation for the city with respect to every item of power plant equipment, substation equipment, shop equipment, garage equipment, and miscellaneous equipment of the building department. As a result of his inspections he determined these classes of property to be in the following per cent condition: Power plant equipment, 64 per cent; substation equipment, 80 per cent; shop equipment, 78 per cent; garage equipment, 82 per cent; miscellaneous building department equipment, 76 per cent.

Mr. Thomas spent two months inspecting the above properties.

G. H. Packwood, who examined the rolling stock, testified to a composite average per cent condition of 71 per cent for rolling stock and made up as follows: Passenger cars, 71.6 per cent; service equipment, 64 per cent; locomotives, 75 per cent. He stated that the foregoing percentages were determined exclusive of allowance for the element of obsolescence.

Automotive equipment was given a per cent condition of 66 per cent by Mr. Packwood, including an allowance for obsolescence.

Mr. Packwood inspected a total of 1596 cars or about 92 per cent of all rolling stock. Approximately six months was spent making this inspection.

S. B. May made a detailed study of each building of the company and reported for the city on the per cent condition of the property as follows: Power station buildings, 68 per cent; substation buildings, 81 per cent; bridges and culverts, 80 per cent; park and resort property, 73 per cent; office buildings, 67 per cent; car barns, 74 per cent; miscellaneous buildings, 77 per cent. May considered obsolescence in buildings.

Mr. Boyles reported for the city on the per cent condition of various groups of property as follows: Wood poles, 65 per cent; tubular poles, 57 per cent; concrete poles, 82 per cent; fixtures, 60 per cent; miscellaneous accessories, pole account, 50 per cent; composite for poles and fixtures, 59 per cent; distribution system, 80 per cent; underground conduit, 80 per cent; transmission, 80 per cent; telephone and telegraph, 70 per cent.

Mr. Frank R. Nohl inspected and reported on track and paving for the city. He walked and took such notes as his ob-

P.U.R.1928E.

servation would permit on 185 miles of track and paving. The results of his inspection as calculated and summarized by Mr. Boyles were as follows: Straight track, 68 per cent; special work (track), 66 per cent; paving on straight track, 70 per cent; paving, special work, 74 per cent.

The testimony of Mr. Nohl indicates seven to eight months were spent in making the inventory of track, track specials, and pavements.

The city introduced numerous photographs and copies of field notes purporting to show representative conditions and their methods in arriving at their results.

The results of the inspections as made by all the witnesses for the city were weighted by Mr. Boyles, and the composite per cent condition calculated by him was 71 per cent.

The company takes the position that in determining fair value on a reproduction basis only actual observable depreciation may be deducted from reproduction cost new, and that only to the extent that inspection of the property shows it to exist.

(3) Land Value.

Land and right-of-way is included in the reproduction cost appraisals of the city and company at the same amounts as were used by them in their original cost appraisals.

Land values are fully set out in the discussion of the differences in the two original cost appraisals.

(4) Working Capital.

The same amounts were used by the city and company in their respective reproduction cost appraisals as used by them in their original cost appraisals and the facts as set out in the discussion of the latter appraisal are applicable to the reproduction cost estimate.

(5) Going Concern Value.

The city estimates \$2,500,000 for going value on both their reproduction and original cost appraisals.

The company estimates \$2,500,000 for going value on their P.U.R.1928E.

original cost appraisal, and on their reproduction cost appraisal estimate \$8,700,000.

The Commission allowed the amount of \$2,500,000 for going value as of January 1, 1919.

Mr. Feustel and Mr. Richey testified for the company that 10 per cent of the value of the property is a fair allowance.

Mr. Perkins, former manager of the property, testified that the property has a going value of \$8,700,000 as of January 1, 1927. The latter figure is a trifle less than 10 per cent of all the items in the company's estimate of reproduction cost less depreciation, and excluding working capital.

Mr. Feustel stated that going value is a judicial question to be decided by the Commission and judicially he should not really express any opinion on going value (Transcript, pp. 147, 150, 152).

(6) *Promotion.*

The difference between the city and company estimates of reproduction cost covering promotion is \$2,090,000.

The city includes promotion in its 17 per cent construction overhead costs. The city in its brief intimates it follows the uniform system of accounts for electric railways and included promotion under Account No. 550, miscellaneous, which includes cash fees paid promoters.

The company allowed 2 per cent as promotion costs in its reproduction cost appraisal. This percentage amounts to \$2,090,000 and is supported by the testimony of Mr. Feustel who said he would allow $2\frac{1}{2}$ per cent. Mr. Richey who stated 2 per cent is a proper allowance, and Mr. Perkins who stated promotion costs would undoubtedly exceed $2\frac{1}{2}$ per cent.

The Commission in its order fixing the fair value as of January 1, 1919, of this property, was of the opinion that \$2,700,000 was a fair amount to allow for promotion and financing.

The city introduced no testimony.

(7) *Financing.*

The company includes \$4,180,000 in its reproduction cost appraisal as a fair sum for cost of financing, based on the testimony P.U.R.1928E.

of Feustel, Richey, and Perkins who stated 5 per cent was a fair allowance.

The city makes no allowance in either its original cost or reproduction cost estimates for cost of financing on the basis that such costs are illegal and should not be considered.

Reproduction Cost—Nonoperating Property.

The same general methods are used by the city and company in determining the reproduction cost of nonoperating property as were used in determining the reproduction cost of operating property except that no working capital, going concern value, financing, and so far as the company is concerned no promotion, is included in the estimate. The city applies 17 per cent to the construction cost as overheads, the same as to operating property which includes promotion. It is, therefore, assumed to be included in nonoperating property.

Construction Cost Index Numbers.

Both the city and the company have made use of index numbers to convert costs, as of one date, to costs as of another date. The company presented in evidence receiver's Exhibit 3, a table of index numbers for January and July of each year from 1913 to 1926 inclusive. Said index numbers were compiled from costs as found in the company's records and represent relative street railway construction costs in St. Louis. In addition to Exhibit 3, the company introduced construction cost index numbers as calculated by the Engineering News-Record publication and as calculated by the American Electric Railway Association. All of these index numbers were calculated with a base January 1920=100.

The company used the index numbers it developed in converting its January 1, 1920 estimated cost of property in the 1919 inventory remaining as of January 1, 1927, into dollars as of that date and in converting the costs of property added each year 1919 to 1926, to costs in January 1, 1927 dollars.

The city accepted and used the United Railways construction cost index numbers in comparing the relation between the P.U.R.1928E.

weighted average dollar in the Commission's 1919 appraisal with the same property expressed in 1927 dollars.

The city's engineers in calculating the weighted cost index factor applying to the 1919 investment cost appraisal, used the Engineering News-Record cost index. This index is projected back to 1903 and the 1903 index cost number was applied to all property installed prior to that date.

Mr. Bennett stated, and the records show, that at January 1, 1919, there was still remaining in the property, items placed as early as 1878.

The following table, taken from the city's brief, p. 319, shows the manner in which the city's engineers developed their composite index factor for investment cost appraisal.

Year	Per Cent of Investment cost allocated to each year	Engineering News-Record Index Numbers	Weighted Yearly Percentages
1891	0.02%		
1892	0.02		
1893	0.03		
1894	1.27		
1895 Assumed	1.09		
1896 same as	0.34		
1897 1903	4.15		
1898 Index	0.31	93.90	32.13
1899	0.55		
1900	15.56		
1901	2.69		
1902	4.14		
1903	8.29	93.90	8.83
1904	3.73	87.40	4.27
1905	1.18	90.55	1.30
1906	4.20	95.10	4.42
1907	10.87	100.55	10.81
1908	3.42	97.20	3.52
1909	10.49	90.92	11.54
1910	2.21	96.33	2.29
1911	0.74	93.43	0.79
1912	4.77	90.70	5.26
1913	4.72	100.00	4.72
1914	3.50	88.56	3.95
1915	8.01	92.58	8.65
1916	1.30	129.58	1.00
1917	1.54	181.24	0.85
1918	0.86	189.20	0.45
	100.00		104.78
Ratio of investment cost appraisal to 1913 prices	= $\frac{\text{Investment cost prices}}{1913 \text{ prices}}$	= $\frac{100}{104.78}$	= .96

The Commission's engineers during the preparation of the P.U.R.1928E.

1919 appraisal, made a computation similar to the above. It was found that \$28,095,910 of the appraised inventory could be definitely assigned to the years in which they were actually spent. The remaining \$6,917,509 was estimated to certain years on the basis of the assumed life of the various items of property.

The American Electric Railway Association cost index numbers 1913=100, and extending back to 1895 were applied by the Commission's engineers.

This method produced a result only approximately correct for the reason that the unit prices and costs of items of property did not in all cases reflect the actual costs as of the date said property was installed. Detailed explanation of the method employed by Commission's engineers is given in the former report of this Commission. (13 Mo. P.S. C. R. 522, 549, P.U.R.1923D, 759). It shows items of property that have a comparatively short life were given a weighted cost over the 13-year period 1906-1918 inclusive, and for items of property installed prior to 1906, on which actual costs were not available, the prices prevailing as of 1906 were used.

For these and similar reasons, the date of construction is not the exact guide to follow in applying cost index numbers, but instead, the dollars of the various years should be brought to date. The engineering department attempted to do this from all the available information and found that if all the property of the company built prior to January 1, 1919 had been built in 1913 it would have cost approximately \$35,000,000.

Spare Parts.

The item of spare parts or pieces of equipment held in reserve for immediate use in case of breakdowns is considered by the Commission's accountants, the city and the company as properly chargeable to "plant."

In the Commission's 1919 appraisal this item was included with material and supplies. Spare parts are in the sum of \$325,414.

P.U.R.1923E.

Additions to Property January 1, 1919 to December 31, 1926.

Addition to property other than land since the Commission's 1919 appraisal are included by the city and company as follows:

	Original Cost Operating	Non-operating	Reproduction Cost Operating	Non-operating
City	\$9,509,320	\$131,054	\$9,574,924	\$130,261
Company	9,729,861	131,054	9,356,590	130,261

The difference of \$220,541 in original cost of additions to operating property is due to the interpretation given the report and audit of the Commission's accountants.

Page 4 of said accountants report and audit of additions to property from January 1, 1919 to October 31, 1926, states:

"With the exception of shop overheads, the company, did not charge any indirect or overhead construction costs to the plant account, such items having been included in operating expenses."

"As is shown in Item 15, Statement #2, we have transferred certain proportions of certain indirect costs to the plant account. However, with respect to transportation of men on revenue cars, general office or administrative expense, and interest during construction we were unable to secure sufficient data to make such a transfer. But such items, in connection with additions and betterments, usually are not large."

Page 26 of said audit shows the items and amounts prorated to plant account to be as follows:

Supervision (except foreman and others assigned to specific jobs)	\$674,638.58
Power used by work trains	40,765.14
Maintenance of work train equipment	103,109.08
Maintenance of trucks and teams	199,810.52
Use of tools	197,148.08
Storehouse expense	95,065.02
Total	\$1,310,536.42

The city in its estimates of both original and reproduction costs, uses the amount as shown by the audits for additions and betterments to the property since January 1, 1919, and assumes that all so-called construction overhead costs are included and if not included, are charged to operation and already paid for by the car rider.

P.U.R.1928E.

The company claims that the above items that were prorated to plant account are not what is ordinarily termed construction overhead costs, with the possible exception of a portion of supervision; that said items are usually included in the unit cost estimates of engineers and appraisers; and that \$220,541 is the estimated proportion of supervision that should be deducted from the accountants' audit in order to leave said audit without any construction overhead costs.

The company later adds 15 per cent to said additions to property as a proper construction overhead charge.

The city, in obtaining an estimate of the reproduction cost of additions to operating property since January 1, 1919, uses the amounts of said additions as shown by the audits for each year, to which is applied the ratio of costs for said years to January 1, 1927, as determined from the United Railways cost index numbers. Their determination is obtained as follows:

Year			
1919	\$641,155 x 103.2%	=	\$662,067
1920	922,766 x 88.7	=	818,493
1921	1,951,388 x 99.3	=	1,937,728
1922	1,638,117 x 104.1	=	1,706,321
1923	1,914,039 x 96.0	=	1,837,478
1924	1,185,951 x 97.4	=	1,154,916
1925	867,030 x 98.4	=	853,158
1926	608,413 x 99.4	=	604,763

Total cost as of January 1, 1927, for period \$9,574,924

The company uses the same method as used by the city in determining the reproduction cost of additions to property except that the \$220,541 of construction overhead costs is deducted from the accountants' amounts before applying index cost numbers. The company's total for additions to operating property valued in January 1, 1927 dollars is the sum of \$9,356,590.

There is no difference between the amounts used by the city and company for nonoperating property added from January 1, 1919 to January 1, 1927.

Depreciation Reserve and Annual Requirement.

The city, after finding the total original cost of operating property as of January 1, 1927, deducted from said cost the P.U.R.1928E.

sum of \$8,469,730, which represents the net balance in the depreciation reserve fund of the company.

The city also maintains the amount of annual depreciation requirement allowed by the Commission is greater than the amount actually required and should be reduced to a maximum of \$1,000,000 per year.

The company is now setting aside by order of the Commission \$1,500,000 each year as an annual depreciation requirement to safeguard the original cost investment in the property.

The audit of the Commission's accountants shows the amounts credited and charged together with the accrued balance as follows:

Year	Credited to Reserve	Charged to Reserve	Accrued Balance
Balance—January 1, 1919			\$2,286,631
1919	\$1,659,268	\$741,675	3,204,223
1920	1,626,888	796,175	4,034,937
1921	1,500,000	1,158,001	4,376,936
1922	1,500,000	684,287	5,192,650
1923	1,500,000	711,592	5,981,058
1924	1,500,000	699,478	6,781,579
1925	1,503,548	731,457	7,553,670
1926	1,510,653	594,594	8,469,729
Total	\$12,300,357	\$6,117,259	\$8,469,729
Yearly average	1,537,544	764,657	

Revenues and Expenses.

The Commission's Exhibit No. 1, being the audit of the company's books to October 31, 1926, shows income account statements for the year 1925 and for the ten months ending October 31, 1926 as follows:

	Jan. 1, 1926 to Year 1925	Oct. 31, 1926
Total operating revenues	\$18,913,333	\$15,671,312
Taxes	1,809,926	1,512,793
Depreciation	1,503,548	1,258,878
Other operating expense	13,131,929	10,859,754
Amount available for return	\$2,467,930	\$2,039,887
Nonoperating income	272,171	162,271
Gross income	\$2,740,101	\$2,202,158

Company's Exhibit No. 20 is a statement of income account as shown by the receivers books for the year 1926 and for twelve months ending November 30, 1927. It is as follows:

	Twelve months ended	Year 1926	Nov. 30, 1927
Gross operating revenues	\$18,873,431	\$18,819,288	
Operating expenses (including depreciation) ..	14,626,848	14,655,486	
Surplus over operating expenses	<u>\$4,246,583</u>	<u>\$4,163,802</u>	
Taxes	1,818,288	1,819,536	
Income available for return	<u>\$2,428,295</u>	<u>\$2,344,266</u>	
Nonoperating income	202,874	156,387	
Gross income	\$2,631,169	\$2,500,653	

Company's Exhibit No. 21 is a statement of income account as shown by the receivers books and gives a comparison between the month of November 1926 and 1927 and a comparison of the eleven months ended November 30, 1926 and 1927.

The gross income in Exhibit No. 21 is as follows:

Month of November, 1926	\$232,638
Month of November, 1927	226,218
Eleven months end November 30, 1926	2,389,197
Eleven months end November 30, 1926	2,258,682

The company in response to the order of this Commission entered herein on June 25, 1927, has filed a statement of its operating income for the year 1927, which appears as follows:

Railway operating revenues	\$18,860,716
Railway operating expenses (including depreciation)	14,680,522
Net railway operations	<u>\$4,180,194</u>
Taxes	1,819,204
Net operating revenues	<u>\$2,360,990</u>
Bus operations—net loss	10,546
Income from operation	<u>\$2,350,444</u>
Nonoperating income	160,185
Gross income	\$2,510,629

During the year 1927, the company operated for a part of the year under a 7-cent cash adult fare, and during a part of the year the fares charged for adults were, Token fare $7\frac{1}{2}$ cents, Cash fare 8 cents.

Rates of Fare.

The company introduced evidence as to the amount of revenue under a fare schedule of 7 cents for adults and 3 cents for chil-

P.U.R.1928E.

dren, and under a schedule of 8 cents for adults and 3 cents for children, based on travel for the year 1926.

Following is the company's estimate of revenue under an 8 cent straight fare based on the year 1926 travel statistics:

At 8 cents straight:

Adult	262,875,639 @ 8¢ ..	\$21,030,051
Child	6,680,091 @ 3¢ ..	200,403
Total	269,555,730 (7.88¢)	\$21,230,454

At the hearing in Jefferson City, February 14, 1928, petitioner introduced evidence showing the result of its experience under the 8 cents cash, $7\frac{1}{2}$ cents token fare put into effect temporarily by the Commission pending the final determination of this cause.

Experience Under 8 Cents Cash, $7\frac{1}{2}$ Cents Token Fare.

Revenue from 8¢ cash, $7\frac{1}{2}$ ¢ token fare for 6-month period, July 5, 1927 to January 4, 1928 inclusive	\$9,422,278
Revenue from straight 7¢ fare for 6-month period July 5, 1926 to January 4, 1927, inclusive	9,233,111
Additional revenue received from increased fare for 6-months period	\$189,167
Experience shows ratio of average for last 6 months of year to average yearly revenue to be	49.58%
Estimated additional annual revenue upon which Missouri Public Service Commission's order of June 25, 1927, establishing an 8¢ cash and $7\frac{1}{2}$ ¢ token fare was predicated	\$1,466,846
Estimated additional annual revenue to be experienced as result of increase in fare from 7¢ straight to 8¢ cash and $7\frac{1}{2}$ ¢ token ($\$189,167 \div 49.58\%$)	381,539
Estimated amount by which the revenue experienced under increased fare failed to equal the amount estimated by the Commission	\$1,085,307

Evidence was introduced by the company showing the number of passengers carried for the years 1919 to 1926 inclusive. To the statement introduced in evidence as receiver's Exhibit 12, it is now possible to add the passenger statistics for the year 1927, and below is given the complete statement.

Year	Revenue Passengers	Transfer Passengers	Total Passengers
1919	263,221,899	145,788,430	409,010,329
1920	287,405,837	154,464,735	441,870,572
1921	282,447,190	150,562,354	433,009,544
1922	286,076,475	152,261,868	438,338,343
1923	292,671,781	165,343,193	448,014,974
1924	279,222,520	149,555,651	428,778,171
1925	270,103,400	145,698,764	415,804,164
1926	269,555,730	145,503,573	415,059,303
1927	258,810,976	140,145,010	398,955,986

P.U.R.1928E,

In speaking of the use of street cars, Colonel Perkins testified: "I believe the trend is upwards. I reason conditions out from various other matters and from observations of what is happening elsewhere. . . . Now, all I can give you is my opinion that we are about at the bottom of the curve." Transcript p. 381, May 17, 1927).

III.

Conclusions:

Original Cost of Physical Property Other Than Land as of January 1, 1927.

There appears to be very little difference of opinion as to the original cost of physical elements of property other than land. So-called construction overhead costs have been treated in a different manner.

The Commission in its former order fixing the value of this property as of January 1, 1919, gave its opinion that 15 per cent of the original cost of physical property, other than land, was a fair allowance for construction overhead costs. (13 Mo. P. S. C. R. 522, 606, P.U.R.1923D, 759). The amount thus allowed was \$5,252,013.

The company has adopted the amount as found by the Commission in the 1919 case and used \$5,252,013 as the correct allowance as of January 1, 1927.

[1, 2] The Commission is of the opinion the company erred in using said amount for the reason that the property as owned on January 1, 1919, has undergone a considerable change and something like \$3,000,000 of said property has been retired and almost \$10,000,000 worth of property added since January 1, 1919.

Retired property that has construction overhead costs included in its original cost, must carry such overhead costs along with its retiral. The same is true with added property. If construction overhead costs have been incurred they are properly inclusive with the cost of said additions.

The city is of the opinion that the audit of all additions to property since January 1, 1919, correctly reflects the entire cost of said additions and if no overhead costs are shown in the P.U.R.1928E.

records of the company, none were incurred and nothing should be added.

It is common knowledge that overhead construction costs are incurred during the construction of a property such as this. The company has estimated general supervision during the construction of property placed since January 1, 1927 was included in the adjusted audit to the amount of \$220,541. The audit of the Commission's accountants shows that any construction overhead costs that were incurred were charged to operating expenses and with respect to administrative expense or interest during construction, there was insufficient data to make a separation.

It is, therefore, indicated that there were so-called overhead construction costs incurred during the period from January 1, 1919 to January 1, 1927, but the Commission is of the opinion that such costs were not as much as 15 per cent of the cost of said additions. There would not be the item of omissions and contingencies since the audit reflects the total cost of specific construction; there would not be any cost for taxes and very small costs for interest due to the additions being placed piecemeal and the period of construction being short.

[3] The Commission is of the opinion an allowance of 5 per cent to cover construction overhead costs applicable to the additions to the company's property from January 1, 1919 to January 1, 1927, is fair and reasonable in the determination of the original cost of said property.

[4] Spare parts of various equipments are purchased by the company and held ready to install in case of breakdowns. The value of said spare parts has been, in the past, carried as a part of material and supplies. The Commission's accountants in their recent audit have considered said parts as stand-by equipment and signified same should be included as a part of the physical elements of property, the same as any machine or equipment.

The city and company agree with the accountants in this respect and the Commission is of the opinion such spare parts should be included in plant account.

The Commission is also of the opinion that due to the nature of said parts and the fact that they are duplicates of items in use and necessitate very little if any so-called overhead expense

P.U.R.1928E.

in their purchase, that no overhead construction costs should be added to obtain the original cost estimate.

[5] The original cost of this property contains without doubt some costs incurred in connection with the promotion and consolidation of the properties.

The Commission in its report and order in this case decided June 4, 1923 (13 Mo. P. S. C. R. 522, P.U.R.1923D, 759) found it impossible to determine the actual amounts of such costs, but from a study of the history of the property, the Commission concluded that \$2,700,000 was a reasonable allowance for promotion, financing, and consolidation costs.

The testimony at that time showed that the present car rider had been greatly benefited by the numerous consolidations that had been affected.

This Commission has expressed its position relative to costs of financing in a number of cases. Bond discount and commissions, in so far as they are a part of interest during construction, are properly chargeable to capital account, but beyond that, the cost of financing, or of assembling capital should not be included in a valuation for rate-making purposes. See Aluminum Goods Mfg. Co. v. Laclede Gas Light Co. and citations therein. (16 Mo. P. S. C. R. 114, P.U.R.1927B, 1).

There is no way of determining how the sum of \$2,700,000 was determined, but this Commission is of the opinion, after a careful review of the evidence, that the amount of this item should not be disturbed and that said amount of \$2,700,000 is allowed for costs of promotion and consolidation.

[6, 7] No deduction should be made from an original cost appraisal for any balance that may be in the depreciation reserve fund of a company.

Utility companies are required to set aside a reserve fund for the purpose of protecting the investment in the property or, in other words, so that at the end of the useful life of the property, the investor will have recovered his investment.

Courts have held that past earnings of a company, when found excessive, cannot be taken from said company for the benefit of future customers and likewise that future customers shall not be required to reimburse a company for past losses. The Com-P.U.R.1928E.

mission, therefore, will not deduct the depreciation reserve fund of the company from the original cost estimate in this proceeding. See *Public Utility Comrs. v. New York Teleph. Co.* 271 U. S. 23, 70 L. ed. 808, P.U.R.1926C, 740, 46 Sup. Ct. Rep. 363.

Making the foregoing adjustments we have the following: [Table omitted.]

Original cost total—January 1, 1927: Operating Property, \$49,355,565; Non-Operating Property, \$569,842; Total Property, \$49,925,407.

Reproduction Cost of Physical Property other than Land as of January 1, 1927.

The Commission is of the opinion that, if its engineering department, at the time of making the original cost appraisal of this property, had also made a reproduction cost appraisal in like detail, and said appraisal had been agreed to as has been the case with the original cost appraisal, they would undoubtedly follow the same procedure as the company has done at this time.

[8] The present reproduction cost estimates of the city and county are obtained by the use of cost index numbers. The city applied an index number to the original cost as determined by the Commission as of January 1, 1919. The company applied an index number to its reproduction cost appraisal as of January 1, 1920.

The Commission found an original cost of the property as of January 1, 1919, after several years of detailed investigation and numerous hearings and the result is agreed to by all interested parties herein.

The reproduction cost appraisal made by the company as of January 1, 1920, was not agreed to by either the city or this Commission, and was not used by the Commission in making its findings of value.

It, therefore, appears logical to use as a basis in this proceeding, a cost that is recognized as correct and that has been adopted by all interested parties herein. The application of cost index numbers may be made to any amounts at any dates, P.U.R.1928E.

and if said amounts are correct and the numbers reflect the true ratio of costs, the results will be identical.

The Commission is, therefore, of the opinion that the method of the city in this case, while not necessarily more correct, is much more logical.

The testimony shows that the index numbers introduced by the company and referred to as United Railways cost index numbers, are more correct when applied to costs of this company, than any other series of numbers, since they were compiled from actual costs of this property. The table of United Railways cost index numbers only extends back to and including the year 1913. The company's property has been installed in varying amounts back as far as 1878, and the Commission's 1919 original cost of the property was determined for the most part on costs and estimates extending back to the year 1900.

[9] The city in applying index numbers to the original cost of physical property other than land has used the Engineering News-Record cost index to determine the weighted average ratio of cost of the property in the 1919 inventory to the 1913 cost and to the result applying the ratio of 1913 to January 1, 1927 costs as indicated by the United Railways index.

The Commission's engineers have converted the 1919 original cost appraisal into 1913 costs by the use of Electric Railway Association cost index numbers and their result is practically the same as found by the city using Engineering News-Record cost index numbers. It is very apparent to this Commission that if the property in the 1919 appraisal had been constructed as of date 1913 it would have cost approximately thirty five million dollars. In other words, it is shown that the estimated original cost of physical property other than land as found by the Commission as of January 1, 1919, very closely reflects what said property would have cost in 1913. The Commission, therefore, finds its original cost estimate as of January 1, 1919 reflects the reproduction cost value as of 1913.

All testimony introduced, the company's brief and all other evidence relative to the United Railways cost index shows without doubt that said index more accurately reflects costs of this P.U.R.1928E.

property than any other index for the reason that it is prepared from actual costs to the company.

[10] The Commission having determined the value of the company's property in 1913 dollars it is only necessary that said dollars be converted to dollars as of January 1, 1927. The United Railways cost index shows the ratio of 1913 dollars to January 1, 1927 dollars is 167. The Commission will, therefore, apply this ratio to the property in the inventory as of January 1, 1919, remaining as of January 1, 1927.

The procedure of the company is correct for obtaining the reproduction cost of property other than land, added since January 1, 1919. Any construction overhead costs should first be deducted and United Railways cost index numbers applied to the remainder. The amounts so found are:

Operating property	\$9,356,590
Nonoperating property	130,261

The city follows the procedure of including such overheads as the accountants for the Commission show in their audit and assuming they are sufficient.

The report of said accountants clearly indicates that construction overhead costs, with the exception of a possible amount of general supervision, were not prorated to plant account.

[11] The Commission is attempting to determine a fair reproduction cost estimate as of January 1, 1927, and such cost could not be determined by including overhead costs on a portion of the property at the book figures and on the remainder by estimate. There are no actual costs in this reproduction cost estimate for none of the property was built on January 1, 1927. It must all be treated as an estimate.

Spare parts of machines, cars, etc., have been correctly included in plant account by the Commission's accountants and the city and company agree to such disposition.

As a part of the plant, construction overhead costs should be applied to said spare parts in a reproduction cost estimate, the same as to any other item of plant account.

[12] The city has applied 17 per cent to physical property other than land, as a proper allowance for construction over-

P.U.R.1928E.

head costs including cost of promotion. The company has applied 17½ per cent exclusive of cost of promotion.

Seventeen and one-half per cent including any added costs for promotion is, in the opinion of the Commission, a fair allowance for construction overhead costs in a reproduction cost estimate of this property.

Depreciation.

There is always a diversity of opinion as to the amount and measure of depreciation present with respect to a property as of a certain date. This difference of opinion may be due to the difference in viewpoint from which different individuals undertake the measurement of the depreciation, to the difference in the conception of what constitutes depreciation under the governing rules of law, to a difference in amount and character of the experience that forms the foundation of the individual whose opinion is given, or it may be due to a combination of any or all of the above.

The Commission is certain after a review of the testimony offered and the evidence introduced, that the amount of depreciation actually existent in the property, expressed in composite figures for the property as a whole, is between 16 per cent and 29 per cent of the reproduction cost of the depreciable property.

The estimates of Mr. Bennett and Mr. Richey, for the company, made no allowance whatever for the element of obsolescence. Estimates made for the city in some cases considered obsolescence. Both the city and company based their estimates of depreciation on actual inspection.

The depreciation studies made by Messrs. Richey and Feustel covered but a short time. Mr. Richey stated that he spent but three days in making his determination of depreciation, and Mr. Feustel stated that he spent approximately nine days. This property is so large and contains so many important items of value that it is the opinion of the Commission that no really definite study could be made in so short a time.

The city's engineers testified that several months were spent by them in making a depreciation study and yet several important items such as track and pavements were not covered in their P.U.R.1928E.

entirety. The company criticizes some of the methods employed by the city's engineers in their determination of depreciation, and yet offers as substantiating evidence of the amount of depreciation, the testimony of men whose length of time on the property was such that only a superficial study was possible.

Mr. Bennett, valuation engineer for the company, has been in constant contact with the property for many years and is thoroughly familiar with all the property. His testimony does not detail his method of determining depreciation but shows that it is from his own inspection, and a consideration of inspection made by others, including Messrs. Richey and Feustel.

Mr. Hawkins who has direct charge of the construction and maintenance of track, paving, building, and other items of company property, and who has been in this capacity many years and is thoroughly acquainted with the property in his care, testified to certain conditions, but on cross-examination admitted that the track, paving, and buildings are in practically the same condition as they were on January 1, 1919.

The Commission found the whole property, as of January 1, 1919 in a 70 per cent condition.

Mr. May, for the city, in making his estimate of depreciation in buildings was evidently influenced to a considerable extent by the fact that the structures are not of modern design. He estimated the condition of power plant buildings as 68 per cent and substation buildings as 81 per cent. Mr. Hawkins for the company testified to 90 per cent condition for both power plant and substation buildings.

The company's testimony shows that all of the property was inspected by it, while the city's testimony shows that a portion of the property was not seen or inspected by it.

The Commission finds, after consideration of all the evidence that the amount of depreciation in the depreciable property of the company is 25 per cent of the cost of reproduction new of said depreciable property, as of date January 1, 1927.

Making the foregoing adjustments we have the following:
[Table omitted.]

Reproduction cost less depreciation of fixed property, other than land, as of Jan. 1, 1927. Operating Property, \$55,044.457;
P.U.R.1928E.

Nonoperating Property, \$667,936; Total Property, \$55,712,393.

Land.

Right-of-Way.

[13, 14] Two different sets of facts and assumptions result in two rather widely varying estimates by the city and the company with respect to the value of the right-of-way of the latter as of January 1, 1927. The difference in the basic facts is the outcome of expressed differences of opinion as to the market value of land adjoining and contiguous to the right-of-way of the company. Both the city and the company claim to have appraised this adjoining and contiguous land on the basis of its market value for ordinary community purposes, disregarding the special use to which the land is or may be put, and disregarding also consequential damages, costs to acquire and excess costs of any other nature. Differences in assumptions by the city and the company, which lead to further disparity in the final figures reached for the value of right-of-way, may be summed up as follows:

The company has determined from the appraisal figures placed on adjacent and contiguous lands, the average unit value of such lands and has applied to its right-of-way holdings the average unit values as indicated by the unit value determinations of similarly situated adjoining and contiguous land.

The city, on the other hand, has assumed that where the right-of-way adjoins the rear end of property, the unit value to be assigned to the right-of-way area is the average value for the rear portion of the lot, and where the right-of-way is along the front of a lot, the city has applied to the right-of-way area in that particular section or zone the average unit value assignable to the front portion of the lot.

The basis of the city's calculation in this respect, as described by Mr. Doyne, who made the right-of-way appraisal for the city, in answer to a question by counsel as to what extent he took into consideration whether the right-of-way in particular zones ran on the rear ends of lots or along the front ends, was as follows:

"A. Well, where the right-of-way ran along the rear of a lot P.U.R.1928E.

I treated it, the value, on the basis that the rear end of the lot, that is the square foot value of the rear end isn't as valuable as the square-foot average of the entire lot, whereas the front end of the lot, the square-foot value on it, is greater than the average square-foot value on the entire lot."

The right-of-way holdings of the St. Louis Public Service Company (formerly United Railways Company of St. Louis), in the city of St. Louis, are of three general types. (1) Strips along the street frontage of public property bordered on one side by a public street or highway, and abutted on the other side by property of a private or special public character, such as the right-of-way of the Market line along the southerly boundary of Forest Park in St. Louis. (2) Right-of-way consisting of a reserve strip in the center of a public street or highway. (3) Right-of-way bordered on one or both sides by interior or rear lot property, or a private or public alley.

Right-of-way holdings falling under types 1 and 2 will, under the city's theory of right-of-way appraisement, take on unit values in excess of the average unit value of similar and adjacent land. Right-of-way which may be classed as type 3 will, under the city's theory, for the most part, perhaps, take on unit values less than the average unit values of adjacent lands. The Hodiamont right-of-way partakes of the nature of both types 1 and 3.

The right-of-way of the company located outside of the city of St. Louis, partakes of much the same general character as the right-of-way within the city. There is, of course, a considerable amount of right-of-way in St. Louis county which extends through unplatte^d lands.

In the absence of opinion based on personal knowledge as to the fair market value of the lands owned by the company, and being almost without means by which values may be analyzed and recalculated, the Commission is forced to base its judgment as to land values on the testimony offered in the case, and an impartial weighting of the evidence before it.

There are certain rules the Commission must keep in mind in its determination of land values.

Our courts have said companies are entitled to a reasonable share in the prosperity of a community and that lands must be
P.U.R.1928E.

included at their increased value; that this increase so allowed cannot be more than the fair average of the normal market value of land in the vicinity having a similar character; that the use of multipliers, or otherwise, to cover hypothetical outlays cannot be considered and that it is error to base estimates of value of right-of-way and other lands upon the so-called "railway value" of property. See Minnesota Rate Cases, 230 U. S. 352, 57 L. ed. 1511, 1563, 33 Sup. Ct. Rep. 729, 48 L.R.A.(N.S.) 1151, Ann. Cas. 1916A, 18.

The Commission also must exclude nonoperating lands from operating lands in a rate-making proceeding.

The city and company have attempted to follow the above rules but their methods of arriving at the results are varied and many.

The Commission is of the opinion, from study of the meaning of the Court in the Minnesota Rate Cases, *supra*, that the city is justified in appraising right-of-way on the "rear-lot" or the "front-lot" theory. Values of lots are ordinarily determined as per front foot, and that price includes a consideration of pavements, sewers, sidewalks, shade trees, and the fact that conveniences such as gas, electricity, and water are available. These items very naturally make the front portion of the lot more desirable than the center or rear of said lot. The rear portion of the lot is not *similar in character* to any other portion of the lot and consideration should be given to such dissimilarity. The same reasons apply to the front portion of lots.

Mr. Herald, in charge of the land appraisal for the company, while giving no consideration to the rear lot or front lot method as concerns right-of-way, does recognize there is a difference. Mr. Herald in testifying as to the value of the loop site at Thurman and Magnolia avenues, stated:

A. "As I started to explain before, I took an average frontage of 116 feet at \$600 a foot, that is, \$69,600 for this full lot depth along Thurman from Magnolia to the alley. I have taken two-thirds of the value for the front 167 feet 6 inches, and one third of the value for the 182 feet 11 inches, the rear of this lot. The United Railways Company owns the rear part, or one-third of the value \$23,200.

P.U.R.1928E.

Q. Why did you make that division?

A. Why, because the rear part of that lot isn't worth as much as the front part."

Mr. Bridell, for the company, testified:

"I think the land in the front would be worth more than the land in the rear. In condemnation proceedings I think if they were taking off some of the man's land in front instead of at the rear I think I would grant more for the front than I would for the rear."

[15] The right-of-ways of the Hodiamont line and of the University-Olive line from DeBalivere avenue to Skinker Road, are 25 feet wide and are separated from the adjoining properties by alleys and steam railroad right-of-way. It appears improper to assess average lot value to right-of-ways thus located.

[16] Throughout the testimony is found evidence of methods and theories of arriving at land values that cannot be recognized by the Commission. The Commission does not believe a proper basis in determining the value of right-of-way is to assume an average sized lot to which shall be applied, front foot values of lots varying in depth. The average values thus found might be equitable or they may be entirely wrong.

[17] Neither is it correct to measure value by the selling price of a lot acquired for some special purpose as was indicated in the testimony of Mr. Herald relative to the sale to Johnson Brothers of a tract at Olive and Spring avenues. (Transcript p. 603).

It is interesting to note the values placed on the lands of the company as of January 1, 1919 and as of January 1, 1927. They are as follows:

	U. R. Co. 1919	Mo. P. S. C. 1919	U. R. Co. 1927	City 1927
Operating property	\$3,809,601	\$2,672,200	\$5,720,218	\$3,194,518
Nonoperating property	531,450	586,152	1,792,300	1,248,918
Total	\$4,341,051	\$3,258,361	\$7,512,518	\$4,443,436

The Commission in its order of 1923, 13 Mo. P. S. C. R. 522, P.U.R.1923D, 759, allowed the value of \$3,262,470 for all lands of the company.

The above table shows the company valued its lands and right-P.U.R.1928E.

of-ways at January 1, 1919 at 74 per cent of the value it places on practically the same lands as of January 1, 1927. It also shows their present value is 130 per cent greater than the value placed by the Commission as of January 1, 1919, and 70 per cent greater than the value of the city as of January 1, 1927. The city is about 4 per cent above the company's 1919 appraisal and 36 per cent above the Commission's finding as of January 1, 1919.

Mr. Doyne, for the city, places several parcels of land, classified by the company as operating property, in nonoperating property. These are set forth on page C of City's Exhibit No. 5 as follows:

	Company Appraisal	City Appraisal
Broadway S. of Gana	\$7,200	\$7,200
Itaska & Gravois (Part)	37,500	22,500
Delmar to Enright	3,700	2,800
Delmar to Washington	5,500	3,600
Broadway & Salisbury	124,200	77,625
Park Ave. Nat'l Yards (Part)	225,632	141,000
St. Louis & Parnell	12,000	9,000
St. Louis & Parnell	19,879	15,900
Total	\$435,611	\$279,625

Mr. Doyne made his appraisal some months subsequent to January 1, 1927, and was unable to state whether the above tracts were in use as of that date, but recited the situation as he found it which briefly is as follows:

The portion of the loop site at Itaska & Gravois had been sold; the tract at Broadway & Salisbury, a former car house, was being used by a lumber company and tracks had been removed; the tracts at Broadway, South of Gana, Park Avenue, and St. Louis & Parnell had been advertised for sale by the company and Mr. Doyne assumed the company no longer considered them necessary to the operation of the property; and the cross walks, Delmar to Enright and Delmar to Washington, were considered useless since people in using them would walk further to a car loading point than they would in going to their nearest street corner.

The testimony shows the cross walks are open and may be used and that there are small amounts of material stored at Park avenue and the St. Louis & Parnell tracts.

P.U.R.1928E.

[18] While these tracts may have been in use on January 1, 1927, the Commission cannot avoid consideration of same in fixing a value that is fair for rate-making purposes. The car riding public should not be obliged to pay a return nor should the Commission ask the car rider to pay a return on property that is known to be unused at the time of said rate fixing. The company has advertised certain properties for sale and the only assumption that can be made is that the company no longer considers such tracts as necessary to their operation. Such tracts should rightly be classed as nonoperating property even though they might be used to some small extent.

No rebuttal testimony was offered to the city's classification of nonoperating lands.

The Commission finds that the two cross walk tracts should be classed as operating property but that the remaining tracts as shown on city's Exhibit 5, page C, should be included with property not used in public service.

The Commission, in view of the above and all the evidence herein, finds the fair value of operating lands as of January 1, 1927 to be the sum of \$4,700,000.

The Commission likewise finds the fair value of Nonoperating Lands as of January 1, 1927, to be the sum of \$1,900,000.

Working Capital.

[19] The Commission in its order of June 4, 1923, *supra*, found a reasonable allowance for cash working capital of this company to be \$434,000. (13 Mo. P. S. C. R. at p. 607.) This amount was based on the fact that the company does a cash business and is equal to one-half of one month's operating expenses.

Operating expenses during the past year average approximately \$1,200,000 per month, so it appears a fair allowance for cash working capital is \$600,000. Material and supplies should be included at the inventory price of \$1,442,164, making a total for working capital of \$2,042,164.

Cost of Financing.

The Commission will not allow any costs of financing for reasons previously set out in our discussion of costs.

Going Concern Value.

[20] Going value is an added allowance for the fact that a property with its business attached and in successful operation has a greater value than the same property ready to operate, but not operating and without any attached business.

[21] The Commission is not of the opinion that going value is wholly dependent on the estimated cost of the property and should be a percentage of said costs.

There seems no logic in the company's use of \$2,500,000 as going value in its original cost appraisal and \$8,700,000 as going value in its reproduction cost appraisal.

[22] Exhibits and testimony show that in spite of a recent increase in fares, the revenue of the company has gradually fallen off. It is problematical when the bottom of the curve will be reached. The Commission is aware that the present owners are making an earnest endeavor to find ways to stimulate car riding and improve the service.

The Commission found in its order of June 4, 1923, *supra*, a fair allowance for going concern value of \$2,500,000.

It is the opinion of the Commission that an allowance of \$3,000,000 is fair for this property at this time.

Collecting our various findings we have the following:

	Operating Property	Nonoperating Property	Total Property
Original cost of physical property, other than land	\$49,355,565	\$569,842	\$49,925,407
Reproduction cost of physical prop- erty, other than land—Jan. 1, 1927	73,392,609	890,582	74,283,191
Reproduction cost of physical prop- erty, other than land, Jan. 1, 1927, less depreciation	55,044,457	667,936	55,712,393
Right-of-way and other lands (pres- ent fair normal market value) ..	4,700,000	1,900,000	6,600,000
Franchises (actually spent)	208,522	....	208,522
Materials and supplies	1,442,164	....	1,442,164
Cash working capital	600,000	....	600,000
Going concern value	3,000,000	....	3,000,000

Present Fair Value.

Our courts have never made any definite rule for the determination of present fair value, apparently for the reason that such a rule would be impracticable in all cases and just P.U.R.1928E.

and reasonable results would be doubtful. In a long line of decisions the United States Supreme Court has designated certain factors that should be considered.

[23, 24] The Commission is of the opinion that stress should not be put on either the original or reproduction cost of this property. The Commission is attempting to fix a value that will keep the car rider from seeking some other means of transportation and at the same time give the company a return as nearly just as is possible and still keep his customers. It cannot be said that the car rider is not seeking other means of transportation. St. Louis and St. Louis county are having normal growths each year and yet, during the past few years the number of revenue passengers has gradually decreased and the latest reports from the company shows the bottom is not yet reached.

The Commission believes that the company has a right to earn a fair return on the fair value of its operating property, and that an 8-cent adult fare will not produce an excessive return.

Justice Butler, in Standard Oil Co. v. Southern P. Co. 268 U. S. 146, 69 L. ed. 890, 895, 45 Sup. Ct. Rep. 465, says:

"It is to be borne in mind that value is the thing to be found, and that neither cost of reproduction new, nor that less depreciation is the measure or sole guide. The ascertainment of value is not controlled by artificial rules. It is not a matter of formulas, but there must be reasonable judgment having its basis in a proper consideration of all relevant facts."

In view of the foregoing and after a careful examination of all the evidence herein, and consideration of all the relevant facts, we find the present fair value of the property of the St. Louis Public Service Company, including all elements of value, tangible and intangible, as of January 1, 1927, to be not less than the following:

Property devoted to public service	\$63,500,000
Property not devoted to public service	2,500,000
Total property	\$66,000,000

P.U.R.1928E.

Annual Depreciation Requirement.

The company is now allowed to set up as an annual depreciation allowance, the sum of \$1,500,000 yearly.

The balance in the depreciation reserve account as of January 1, 1919 was \$2,286,631. This has gradually increased until on December 31, 1927 there was \$8,469,730 in said reserve. The yearly average of charges to depreciation reserve over this 8-year period has been \$764,657, the largest year being 1921 when \$1,158,001 was charged and the smallest year being 1926 when \$594,594 was charged to said reserve.

[25] The purpose of a depreciation reserve is to retire the actual cost of the depreciable property at the end of its useful life.

During the past eight years the company has spread their retirements in the proper manner. A property that has been properly operated makes its budget of expenses so that approximately the same amount will be expended each year on retirals.

The Commission believes this property has been efficiently operated. The per cent of depreciation as found by the city is slightly less than found by the Commission and company engineers as of January 1, 1919. The company claims its property is in much better condition than in 1919. If the company can, over a period of years, keep the depreciation in its property normal, the amount of money expended in doing so, seems a reasonable measure of what is needed. It is true that expenditures take care of only the property that has served its usefulness and on which depreciation may be considered as 100 per cent. There is present at all times, depreciation that is known as "latent" depreciation and a reserve must be provided to take care of such depreciation.

[26] The company has accumulated approximately eight million five hundred thousand dollars in its depreciation reserve account and if allowed to accumulate at the rate it has during the past eight years it will soon total a large per cent of the actual cost of the property.

In view of past expenditures, the present large reserve, and the present physical condition of the property as compared with P.U.R.1928E.

conditions of the past, the Commission is of the opinion that \$800,000 is a just and reasonable amount for this company to place yearly in its depreciation reserve fund.

Revenues, Expenses and Return.

The company is asking for a straight 8-cent cash fare.

The operating data furnished in the exhibits described *supra*, shows:

	1925	1926	1927
Revenue passengers carried	270,105,400	269,555,730	258,810,976
Operating Income	Commission Accountants	Company Exhibit	Company Exhibit
Operating revenues:			
Passenger revenues	\$18,628,734	\$18,601,698	\$18,591,212
Other revenues	284,598	271,733	269,504
Total revenues	\$18,913,332	\$18,873,431	\$18,860,716
Operating expenses (exclusive of depreciation)	14,941,854	14,945,136	14,999,726
Net revenue available for depreciation and return	\$3,971,478	\$3,928,295	\$3,860,990
Depreciation	1,503,548	1,500,000	1,500,000
Net revenue available for return ...	\$2,467,930	\$2,428,295	\$2,360,990
Bus operations—net loss			10,546
Total	\$2,467,930	\$2,428,295	\$2,350,444
Nonoperating income	272,171	202,874	160,185
Gross income	\$2,740,101	\$2,631,169	\$2,510,629

It will be observed that the number of revenue passengers is constantly decreasing. Operating revenues in 1927 did not decrease in the same ratio as revenue passengers for the reason that a fare increase was granted in 1927.

Operating expenses during the 3-year period fluctuated only slightly. Commission's accountants made certain adjustments to 1925 operating expenses to increase such expenses by reason of an underestimate of the cost of injuries and damages, but they made other increases and decreases of operating expenses, so that the net charge made by them in 1925 operating expenses was very small in amount.

For the reason that the passengers carried have been decreasing, it appears that the result of an increase in fares should be calculated upon 1927 operations.

P.U.R.1928E.

Increase in Fares.

The record does not contain complete information with respect to the number of adults and children, separately, carried in 1927. However in 1926 there were carried:

Adults	262,875,639 or	97.52%
Children	6,680,091 or	02.48%
Total	269,555,730 or	100.00%

If these per cents be applied to the passengers carried in 1927, we would have

Adults	252,392,464
Children	6,680,091 or 02.48%
Total	269,555,700 or 100.00%

On the basis of a straight 8-cent adult cash fare, and the passengers carried in 1927, the annual passenger revenue would be:

252,392,464 at 8 cents	\$20,191,397
6,418,512 at 3 cents	192,555
Total passenger revenues	\$20,383,952

This is an estimated increase of \$1,792,740 over the passenger revenue earned in 1927.

Decrease in Annual Depreciation Allowance.

The annual depreciation allowance is decreased to \$800,000, which results in an increase of \$700,000 in the net revenue available for return.

Income Taxes.

Any increase in net revenue is subject to income taxes, Federal and state.

The income tax rates under 1928 tax laws are 12 per cent for Federal and 1 per cent for state taxes. The composite rate is 12.77 per cent.

If 12.77 per cent be applied to the total net increase of \$2,492,740, the income taxes will be increased by \$318,323.
P.U.R.1928E.

Recapitalization:

Net revenue available for return in 1927 as per company exhibit	\$2,360,990
Estimated increase in fares	1,792,740
Decrease in annual depreciation allowance	700,000
Total	\$4,853,730
Less increase income taxes	318,323

Adjusted net return for 1927, based upon 8-cent fare for adults,
3-cent fare for children \$4,535,407

[27] This return is 7.14 per cent upon a valuation of \$63,-
500,000 and shows that an 8-cent adult fare is not excessive.

The universal system of transfer tickets should continue as
at present.

An order will issue in accordance with the foregoing. [Order
omitted.]

Brown, Chairman, Ing and Calfee, Commissioners, concur;
Porter, Commissioner, concurs in results; Hutchison, Commis-
sioner, absent.

COLORADO PUBLIC UTILITIES COMMISSION.**RE ARVADA ELECTRIC COMPANY.**

[Application No. 1160, Decision No. 1880.]

Rates — Franchises — Commission jurisdiction — Construction of ordinance.

1. A definite statement in one section of an ordinance that cer-
tain rates specified in two other particular sections of the same should
be subject to the regulation of the Commission, presumably does not
apply to rates also fixed in the first section itself, p. 473.

Rates — Franchises — Waiver.

2. A utility which has been given a franchise by town ordinance
specifying rates to be charged stands in the same position as if the ordi-
nance had not specified such rates, where, by its own action, no benefit
has been claimed by reason of the insertion of such rates in such
ordinance, p. 474.

Rates — Franchises — Duty of Commission — Waiver.

3. It is the duty of the Commission to the public to take such
necessary steps as will prevent rates which have been inserted in an
ordinance granting a franchise from having any higher standing or se-
P.U.R.1928E. *

curer footing than they would have if they had not been so inserted, notwithstanding the announced intention of the utility to claim no special benefit from such rates, p. 475.

Certificates — Condition — Waiver of franchise rate.

4. Authority was given to a utility to exercise franchise powers given in an ordinance, which also specified rates to be charged, upon condition that the utility waived any rights to charge such rates, without the approval of the Commission, p. 478.

[August 27, 1928.]

APPLICATION of an electric utility for authority to exercise franchise privileges; granted upon condition.

Appearances: Robert G. Strong, Denver, for applicant; George B. Campbell, Denver, pro se et al., protestants.

By the **Commission:** On July 13, 1928, the Arvada Electric Company, a Colorado corporation, having its principal office and place of business in the town of Arvada, Jefferson county, Colorado, filed its application for an order authorizing the exercise by it of franchise rights granted by an ordinance passed by the town of Arvada. George B. Campbell, filed with the Commission a letter in which he stated that he had been authorized by many of the customers of the applicant to file a protest against the rates on the ground that they are inequitable, discriminatory, and unjust and to ask this Commission to take jurisdiction of the matter, by a public hearing of the same, and permit the customers of said company to present their side of the case prior to taking action upon the schedule of rates filed by said company. The letter continued, stating: "We will file a petition to that effect in the near future, and will seek to have your Commission make a thorough investigation of the plant, the books and determine what would be fair rates to be awarded to said company, and desire to be notified of any date of hearing that your Commission may set." The matter was set for hearing and was heard in the hearing room of the Commission in Denver on August 2, 1928.

No petition or any other instrument has been filed by Mr. Campbell or any other persons relative to the rates to be charged by the company.

The applicant has been serving the town of Arvada for twenty
P.U.R.1928E.

years. No other like utility has been serving said town. The value of its equipment used in serving the town and the contiguous territory is \$170,000. That portion of the equipment used in serving the town alone is said by the president of the applicant to be worth \$65,000. However, these figures shall not be binding upon the Commission in any hearing had for the purpose of fixing or passing upon rates.

On July 9, 1928, the board of trustees of the town of Arvada passed an ordinance granting the applicant certain franchise rights, privileges, and authority to own, erect, construct, extend, operate, and maintain a plant or system for the supply, distribution, and sale of electricity within the corporate limits of said town of Arvada, and any further additions thereto, for a period of twenty-five years. On July 13, 1928, the applicant accepted said ordinance.

[1] Section XI authorizes the applicant "to charge consumers within the town limits of the town, for electric service, at not to exceed the following rates." The rates are then stated in detail. Sections XII and XIII fix the rates to be charged for the lighting of streets, avenues, alleys, bridges, and public places of the town and for energy consumed by the town for water pumping purposes. The last paragraph contained in § XI of said ordinance reads as follow: "The contract rates provided for in § XII and § XIII shall be subject to the jurisdiction of the Public Utilities Commission with full power and authority to regulate the same." While the last paragraph of § XI, which was quoted by us, makes no reference to its rates under § XI, we understand that the statement made by Mr. Sterne applies to them as well as to those rates to be charged under §§ XII and XIII. However, we cannot overlook the fact that, presumably for some reason or other, the statement does not apply to rates stated in § XI.

Mr. George B. Campbell, appeared with a number of witnesses and offered to make proof that the rates, particularly those charged to the residents of the town, are unreasonable. In this connection we might state that, as the evidence shows, on July 12, 1928, the applicant filed a tariff of rates identical with those
P.U.R.1928E.

set forth in the ordinance. The rates applying to the town of Arvada were a reduction. Therefore, the Commission, pursuant to its practice, authorized the said rates to become effective July 16, on less than the thirty days' notice which is required in all cases other than those where a reduction is made. The rates were, therefore, effective prior to the date of the hearing. W. C. Sterne, president of the applicant, testified in effect, as we understood him, that this applicant does not, and will not claim in any rate hearing that might be held by this Commission, any greater right to charge the rates specified in said ordinance than if they had been omitted therefrom.

[2] The Commission during the hearing informed Mr. Campbell that if he was prepared to show that the applicant on account of any fundamental reason or reasons, such for instance as an antiquated inefficient system, could not lawfully be required to furnish electrical energy in the town of Arvada at reasonable rates as compared with rates prevailing in other towns similarly situated, the Commission would hear testimony along that line. But it further held that so far as the particular rates now in effect and proposed to be charged at the present time are concerned, the Commission would not hear evidence on them, as the hearing on the application should not be converted into a rate case, and as it stands ready, in the performance of its duty, at any time upon proper application to hear evidence and fix reasonable rates.

The applicant might conceivably contend that since the town has seen fit to pass an ordinance fixing rates, it is entitled to the benefit thereof, including possibly a strong presumption that those rates are fair. If it should be, the Commission would have owed the duty to hear evidence concerning the reasonableness of the rates. But the position taken by the applicant in support of its objection to the admission of evidence attacking the reasonableness of the ordinance rates is wholly inconsistent with any claim that the rates are entitled to more consideration than if they had not been fixed in said ordinance.

Our uniform practice in passing upon the question of granting authority to exercise franchise rights granted in an ordinance not

P.U.R.1928E.

fixing rates has been not to require any evidence as to the reasonableness of rates that the utility is then charging or that it proposes to charge in the immediate future. This practice obviously is based upon the assumption that the duty of the Commission to safeguard the rights of the public does not require it in such a hearing to consider rates because they at all times are subject to the power of the Commission to change them. We, therefore, adhere to the opinion expressed at the hearing herein that if by the action of the applicant and this Commission no benefit can be claimed by the applicant by reason of the insertion of the rates in the ordinance, the case stands in the same position as other cases in which the ordinance does not specify rates.

[3] Not having permitted the protestants to go into the matter of rates, except as hereinbefore stated, we feel it our duty to the public to be sure that such steps have and will be taken as are necessary to prevent the rates in question from having any higher standing or more secure footing than they would have if they had not been inserted in the ordinance. If the applicant's president was sincere in the statement to the Commission made while on the stand as a witness (and we have no reason to doubt his sincerity), the applicant should have no hesitancy in co-operating with the Commission towards the end stated.

In Denver & S. P. R. Co. v. Englewood, 62 Colo. 229, P.U.R. 1916E, 134, 137, 139, 161 Pac. 151, 4 A.L.R. 956, the supreme court of this state held that the legislature had conferred no specific power upon the town of Englewood to enact a rate-making ordinance and that "The only specific power conferred upon the municipality by this section is to grant a franchise in the form of an ordinance. There does not appear a suggestion as to a rate-making power, and no such power can be inferred."

The court then continued in the same paragraph saying: "It may be conceded that, as between the parties, such ordinance constituted a valid contract."

On page 236 (of 62 Colo.) the court's opinion continues as follows: "From the sections quoted, and from other provisions of the act, it fully appears that the legislature intended to delegate to the Public Utilities Commission the administration, supervi-P.U.R.1928E.

sion, and regulation, of all service rendered to the public throughout the state, including municipalities. Rates and regulations fixed by contract are specifically included within the powers of the Commission.

"From what has been said it will be seen that the town of Englewood had no express authority to fix a rate of fare, so as to limit or prohibit the assumption of such power by the legislature."

As to the question of the impairment of the contract made by virtue of the passage and acceptance of the ordinance the court held, *supra*, at p. 240 of 62 Colo.:

"The contract, having been entered into without express legislative authority, was permissive only. It was conditioned upon the exercise of the sovereign power over the subject-matter. All this the parties to the contract were bound to know when they entered into it. There can be no impairment of the contract by the act of the state in claiming its own, when it is not bound by the contract. The supervision and regulation of the rates by the state, through the Public Service Commission, do not take from either of the parties to the contract any right which they had thereunder. Such supervision and regulation do not, therefore, impair the obligation of a contract."

The court finally concluded on page 241 of 62 Colo. with the following language:

"It follows, therefore, that the power to regulate the rates of the public utility in question, is vested by the act exclusively in the Public Utilities Commission. The law fully provides that every order or decision made by the Commission, may be reviewed by the supreme court, upon the application of either party, or of any person pecuniarily interested in the utility, for the purpose of having the lawfulness of the order or revision determined."

In *Ohio & C. Smelting & Refining Co. v. Public Utilities Commission*, 68 Colo. 137, 142, P.U.R.1920D, 197, 201, 187 Pac. 1082, the court passed upon the power of this Commission to change the rates which had been agreed upon in a contract entered into by the utility and a private corporation relative to the rate to be charged the latter for electrical energy consumed by it. P.U.R.1928E.

The court called attention to the fact that it had heretofore decided the question as to contracts entered into by municipalities in relation to rates to be charged by public utilities, as affected by the after asserted power of the state, and held that a careful review of the authorities "leads us to the conclusion that this rule as to the after-asserted exercise of the police power applies equally in the case of contracts relating to a public service as between persons and corporations."

However, we find in the opinion on page 148 of 68 Colo., P.U.R.1920D, at p. 207, the following significant language:

"This is the exercise of a very grave and dangerous power, and should be asserted with the greatest caution, and by means of every instrumentality at the command of the Commission, to determine with reasonable certainty that the rate fixed in the contract injuriously affects the public welfare. It is not as if the Commission were to establish a rate in the first instance, as based upon its own judgment as to reasonableness, but it must first determine that a contract in this respect, between persons engaged in the particular business and presumably well advised as to its probable effect, not only at the time, but in the light of future conditions, is so unreasonable as to be detrimental to the public interest."

Whether the statement made by the court and just quoted, that the changing of rates fixed by contract between a public utility and a private corporation is the exercise of a grave and dangerous power, would apply with equal force to the action of the Commission in changing rates fixed by a municipal ordinance and accepted by the utility, we are not quite sure. If the court should hold that the changing by this Commission of the rates fixed by this ordinance is the exercise of a very grave and dangerous power that should be asserted with the greatest caution, it would then appear that in some further rate hearing the proof that might be submitted in support of an attack on the rates would have to be stronger than what might ordinarily be required in a rate hearing where rates which have not been fixed by an ordinance are in question. That the statement would apply to rates fixed in an ordinance was assumed by this Commission in *Re Coal Creek Water & Light Co.* P.U.R.1926D, 571, 573, P.U.R.1928E.

[4] After careful consideration of the evidence the Commission is of the opinion and so finds that the public convenience and necessity requires the exercise by the applicant of the franchise rights granted it under and by virtue of the terms of the ordinance passed by the board of trustees of said town of Arvada on July 9, 1928, upon the condition that, and if and when the applicant shall within twenty days after the date hereof file with the Commission a written statement and agreement duly authorized by applicant's board of directors to be made, signed, and filed by its president, reading as follows:

"Pursuant to the order of the Public Utilities Commission of the state of Colorado made on August 27, A. D. 1928, and to make effective said order authorizing the exercise by the applicant of the franchise rights granted it by the board of trustees of the town of Arvada, Colorado, on July 9, 1928, the undersigned, the Arvada Electric Company, hereby waives and renounces any and all rights that it might conceivably have to charge any fixed or certain rates specified in said ordinance, and the undersigned agrees that the Public Utilities Commission of the state of Colorado shall have the same power and jurisdiction to hear and determine the question of and to fix fair, reasonable, and lawful rates that it would have if nothing whatever had been said in said ordinance about said rates, provided, however, that said rates so specified in said ordinance shall remain in force and effect until such time, if any, as they may lawfully be changed, as in the change of rates not fixed in an ordinance."

Chairman Bock did not participate in the hearing and disposition of this case.

NEW YORK DEPARTMENT OF PUBLIC SERVICE.
STATE DIVISION, PUBLIC SERVICE COMMISSION.

RE CONSOLIDATED GAS COMPANY OF NEW YORK.

[Case No. 4991.]

Parties — Consolidation proceeding — Party in interest.

A voluntary body composed of individuals joined together for the P.U.R.1928E.

alleged purpose of protecting the interest of small consumers in the development of the remaining water power resources of the state, and to secure more effective regulations of light and power rates was held to have no more power or authority to participate in a consolidation proceeding between a city gas and electric company than its individual members, and, therefore, not to be an interested person.

[September 11, 1928.]

APPLICATION for rehearing of consolidation proceedings; denied.

By the Commission: On August 9, 1928, P.U.R.1928E, 19, this Commission authorized the Consolidated Gas Company of New York to acquire all of the outstanding capital stock of the Brooklyn Edison Company, Inc., and to issue 1,800,000 shares of its new common stock, without par value, and 900,000 shares of its present \$5 cumulative preferred stock, without par value, in exchange therefor, on the basis of two shares of new common stock and one share cumulative preferred stock of the Consolidated Gas Company, for one share of the stock of the Brooklyn Edison Company, Inc.

The public committee on power in New York state was permitted to file a brief before the Commission's determination, and raised a number of points, each of which was considered and discussed in a memorandum approved by the Commission. The city of New York appeared by its corporation counsel, participated in the hearings held, and likewise filed a brief, which was considered by the Commission.

The committee and the city of New York have filed separate petitions asking for a rehearing.

The committee's request is based upon the ground that, although it was and is an "interested person," it was not permitted to be heard, i. e., participate in the proceeding and present evidence and examine and cross-examine witnesses.

The Commission has considered the argument submitted with the application for a rehearing, and is of the opinion that the committee has presented nothing which justifies the Commission in granting said application.

The committee does not represent, nor is it a public body charged with any statutory duty or possessing any statutory right
P.U.R.1928E.

to represent, the state or any of its agencies, or the public or the stockholders of the utility companies. It seems to be a voluntary body composed of individuals who, it is alleged, have joined together to "protect the interest of the small consumers in the development of the remaining water power resources of the State, and to secure more effective regulations of light and power rates." It has no more power or authority to participate in a proceeding like the instant one than have its individual members.

Practically all of the court decisions, in passing upon the question of the right of a person to participate in a proceeding because of "interest," require the interest to be a pecuniary or property interest or to involve a right or duty of the person in question. We do not see how the public committee on power can show that it is "interested" within this ordinary legal acceptation of the term.

The application by the city of New York for a rehearing is directed to paragraph 4 of the Commission's order, which requires the Consolidated Gas Company of New York to record the acquisition of the stock of the Brooklyn Edison Company, Inc., by making certain entries upon its books of account. It would seem to be necessary only to call attention to the fact that such entries relate only to the investment accounts of the Consolidated Gas Company and have no bearing upon the fixed capital accounts of said company or the value of its property devoted to the public service, upon which its rates for gas are based. Furthermore, the memorandum of the Commission, and the order granting the application, specifically provide that nothing in the entire transaction shall be considered, offered, or received in evidence, in any proceeding, suit or matter hereafter involving the value of the property of the Brooklyn Edison Company, Inc., or its rates or charges.

We are, therefore of the opinion that the city of New York has likewise presented nothing to justify the Commission in granting its application for a rehearing.

P.U.R.1928E.

ILLINOIS COMMERCE COMMISSION.

RE CHICAGO & JOLIET TRANSPORTATION COMPANY.

[No. 14896.]

RE CHICAGO & WEST TOWN RAILWAY COMPANY.

[Cross Petition No. 14896.]

RE INTER-CITY MOTOR TRANSPORTATION COMPANY.

[No. 17434.]

RE ALTON TRANSPORTATION COMPANY.

[Nos. 16164, 16897, 17270, 17276-17278.]

RE MOHAWK STAGE LINES CORPORATION.

[No. 17162.]

RE ILLINOIS MOTOR COACH COMPANY.

[No. 14189.]

RE TRI-STATE BUS COMPANY.

[No. 16613.]

RE ST. LOUIS CHICAGO MOTOR TRANSIT COMPANY.

[No. 15542.]

RE PEORIA BUS TRANSPORTATION COMPANY.

[No. 14646.]

RE GADBERRY TRANSPORTATION COMPANY.

[No. 14267.]

RE ILLINOIS TRACTION, INCORPORATED.

[Nos. 15973, 16073.]

Certificates of convenience and necessity — Evidence of necessity.

1. The fact that a motor coach line would aid materially in the
P.U.R.1928E.

development of a territory which had been retarded by the lack of transportation facilities and was recently subdivided was taken into consideration in determining the necessity for such a route, p. 488.

Service — Automobiles — Through and local service.

2. Through service by motor busses was ordered on certain routes where local bus service did not meet public needs and where the route would not support more than one bus line operating in a given territory, p. 495.

Monopoly and competition — Duty of Commission — Transportation company.

3. It is the duty of the Commission to prevent as far as possible the duplication of facilities and economic loss resulting from permitting motor transportation by independent companies to be inaugurated in territory competitive with existing carriers, p. 496.

Certificates — Preference between applicants.

4. Certificates for operation of bus routes were granted to companies incorporated by existing rail carriers in an effort to protect the latter from independent competition as long as they should be willing and able to give needed public service, in view of the added facilities possible for such motor service that could not be furnished by independent companies, p. 498.

Certificates — Preference between applicants — Extra facilities.

5. Certificates for bus operation were granted to subsidiaries of existing rail carriers where experienced employees, stations, storage, baggage transfer, telegraph, and commercial telephone lines were all available to an extent that would be prohibitive for an independent bus line to furnish and where such equipment was necessary for economical and efficient automotive service, p. 498.

Certificates — Evidence of necessity — Financial ability.

6. Evidence of financial ability to operate a motor coach line over proposed territory is insufficient to warrant the grant of a certificate, p. 508.

Certificates — Reason for refusing — Ultra vires.

7. Certificates to operate bus routes were not withheld from the subsidiary of a railroad incorporated by the receiver of the latter upon order of the Federal District Court, notwithstanding a contention that the company was acting *ultra vires* in attempting to operate busses, p. 508.

Commissions — Jurisdiction to determine corporate powers.

8. The determination of charter rights of a corporation applying for a certificate of convenience and necessity is a judicial question over which the Commission has no jurisdiction as long as the company is endeavoring to carry on a utility business apparently within the scope of its charter, p. 508.

Service — Automobiles — Through and local service.

9. It is in the public interest that through bus service should be furnished by the same companies which render local service, p. 511.

Monopoly and competition — Transportation company.

Statement that the introduction of automotive transportation on a large scale in this country has caused a loss in railroad patronage running as high as from 30 to 40 per cent during the last ten years, p. 497.

Monopoly and competition — Transportation companies.

Discussion of the means taken by railroads to cope with automotive competition, p. 497.

Monopoly and competition — Protection of existing carriers.

Review of decisions favoring the policy of protection to existing carriers as long as they stand ready, willing, and able to give the public the service needed, p. 500.

Certificate — Preference between applicants — Existing carrier.

Review of decisions holding that existing utilities should be granted certificates of convenience and necessity in preference to independent operators, p. 505.

[June 13, 1928.]

APPLICATIONS of various companies for certificates of convenience and necessity to operate as motor bus carriers; applications severally denied or granted in accordance with opinion.

By the **Commission:** Those applications pertain, some to the whole, some to part only, of the concrete highway between Chicago and East St. Louis, designated as state bond issue Route 4; and, between Chicago and Joliet, Route 4A is also included. The applicants seek to establish motor bus transportation along this road, which starting at Chicago on the North, serves Joliet, Bloomington, Springfield, Carlinville, Edwardsville, Mitchell, Granite City, Venice, and East St. Louis.

Among the applicants are three public utility companies (or subsidiaries thereof, now rendering service in some part of the territory affected. On the North, the Chicago & Joliet Transportation Company desires to operate between Chicago and Joliet over Route 4. The capital stock of this company is owned by the Central Illinois Public Service Company, as that of the Chicago & Joliet Electric Railway Company, which gives electric railway service between Joliet and Chicago along Route 4A on the east side of the Desplaines river valley and between Summit and Lyons, extending from state bond issue Route 4A and crossing state bond issue Route 4. On the south, from Lincoln to Venice, Illinois Traction, Incorporated, seeks a certificate P.U.R.1928E.

which will enable it to supplement the service given by its interurban line in that territory. The Alton Transportation Company, a corporation organized by the receivers of the Chicago & Alton Railroad Company, originally sought to cover the entire route between Chicago and Mitchell, there to join with its Jacksonville line now running from Jacksonville to East St. Louis under a certificate granted in Case No. 16164 (consolidated) September 15, 1926. This company has, however, subsequently withdrawn its applications as to the Chicago-Joliet and the Carlinville-Mitchell territories. Although separate corporate entities, the Chicago & Joliet Transportation Company and the Alton Transportation Company are in effect parts of the railway systems of the Chicago & Joliet Electric Railway Company and the Chicago & Alton Railroad Company respectively, and will be so treated in this opinion. Each of these applicants seeks to protect its large investment, and each already operates some busses as a common carrier under authority of this Commission.

The other applicants are companies having no association in interest or connection with any rail carrier. The St. Louis-Chicago Motor Transit Company (Docket No. 15542) has in the past operated interstate service between Chicago and St. Louis. The record shows that it has also done an intrastate business without securing a certificate of convenience and necessity from this Commission and that its operation in this respect has been enjoined by the courts. On the motion of the Illinois Motor Coach Company, its application herein (Docket No. 14189) has been dismissed. The Tri-State Bus Company (Docket No. 16613) desires to operate a through service between Chicago and St. Louis, and asks for a certificate allowing it to operate and engage in local business as well between Chicago and East St. Louis, except as to certain territory. The Peoria Bus Transportation Company (Docket No. 14646) desires to operate between Dwight and Bloomington. Inter-City Motor Transportation Company (Docket No. 17434) seeks a certificate to operate a through service between Chicago and Joliet, while the Mohawk Stage Lines Corporation (Docket No. 17162) seeks to operate over the same route as part of a service extending between Chicago and Rock Island. In the course of the hearing the

P.U.R.1928E.

Chicago & West Towns Railway Company appeared and filed an application to operate between Harlem avenue, in the village of Lyons and Stickney, upon and along Route 4 through the village of Lyons and township of Lyons to Lawndale avenue (Docket No. 14896).

The Gadberry Transportation Company (Docket No. 14267) seeks a certificate to operate along Route 4 between Wilmington and Dwight. The capital stock of this company is now owned by the Alton Transportation Company.

All of the cases were consolidated and extensive hearings held. Each applicant appeared as an objector to the applications of all other companies; each complied substantially with General Order No. 116 as to the form of application notification to other utilities and local authorities, publication of notice, and all other formal prehearing requirements of this Commission. Various other objectors interested in portions of the route appeared and were heard. The first question to be considered and determined is that of public convenience and necessity. All of the evidence on this question was introduced in sections, and it will be convenient to discuss the question in the divisions thus made. They are: Chicago to Joliet; Joliet to Bloomington; Bloomington to Springfield; Springfield to Carlinville; and Carlinville to Venice and East St. Louis.

Before going into discussion of the divisions, however, some consideration should be given to the general character of the route. It runs practically through the center of the state and serves many important towns, including the state capital. It substantially follows the line of the Chicago & Alton Railroad Company between Chicago and East St. Louis, and the Chicago & Joliet Electric Railway Company between Chicago and Joliet, and Illinois Traction, Incorporated, between Lincoln and Venice. The existence of these railroads contributed to the development of the territory and to the location and establishment of many of the towns and industries in it. At either end are St. Louis and Chicago. Both are magnets attracting travel from all of the intervening territory, a thickly populated, prosperous farming territory. There is considerable manufacturing along this route. Beginning at Lincoln, and extending South to Edwardsville,

P.U.R.1928E.,

there are coal mines at or near almost every town. Mining is also being resumed in the Northern Illinois field near Wilmington. The route goes through ten counties and serves the county seats of all but two of them—Grundy and St. Clair—which are only touched by the road. It is apparent that the transportation needs of such a territory deserve careful consideration.

There are two recently built highways between Chicago and Joliet; Route 4 runs on the west side of the Desplaines river valley, and Route 4A on the east side. All of the applicants as to territory between Joliet and Chicago, except the Alton Transportation Company, and the St. Louis-Chicago Motor Transit Company, seek certificates allowing them to operate over Route 4. The Alton Transportation company has withdrawn its application to operate over Route 4A, leaving for sole consideration as to Route 4A the application of the St. Louis-Chicago Motor Transit Company.

The territory along Route 4A, which lies east of the Desplaines river valley and between Chicago and Joliet, is already adequately served by the Chicago & Alton Railroad Company, and the Chicago & Joliet Electric Railway Company, and the evidence shows no need for any motor bus service along this route, and if any motor coach line were permitted to be established, it would take business from the Chicago & Joliet Electric Railway Company and from the Chicago & Alton Railroad Company.

The evidence shows that the Chicago & Joliet Electric Railway Company operates a road bed in a fine condition; that its cars are comfortable; that it operates daily between Joliet and its terminus in Chicago hourly service, commencing at 4 A. M., with an additional one at 4:30 A. M. with the last car leaving at 10:30 P. M.; that it operates regular service between Chicago and Joliet hourly, commencing at 5:30 A. M. to midnight, with an additional one at 10:30 P. M.; that it operates a limited service between Joliet and Chicago, leaving Joliet at 7:30 A. M., 10:35 A. M., 6:35 P. M. and 9:35 P. M., and between Chicago and Joliet at 6:15 A. M., 9:30 A. M., 12:20 P. M., 8:20 P. M. and 11 P. M.; and between Argo and Cicero avenues it operates ten to twenty minutes' service, commencing at 5:05 A. M. and P.U.R.1928E.

ending at 12 midnight; that between Joliet and Lockport it operates regular fifteen-minute service, commencing at 4:30 A. M. and ending at 11 P. M., then 11:20 and 11:45 P. M.; that in addition it operates tripper service during the day along the line and wherever and whenever necessary; that it keeps in close touch with the traffic situation and always has cars on hand to take care of the traveling public.

State bond issue Route 4 lies west of the Desplaines river, the drainage canal and the old Illinois & Michigan Canal for a distance varying from about one-half a mile to three miles. From Joliet to Chicago the route in question is 41 miles. Immediately east of the drainage canal, the Desplaines river and the old Illinois & Michigan Canal, is the Chicago & Alton Railroad the Atchison, Topeka & Santa Fe Railroad, and just easterly of these, state bond issue Route 4A. Along state bond issue route 4A practically all the way is the Chicago & Joliet Electric Railway Company extending to Archer and Cicero avenues in the city of Chicago, together with a branch extending from Summit crossing state bond issue Route 4 to Lyons.

The evidence shows that along state bond issue Route 4 until McCook, about twenty-five miles from Joliet, is reached, there is no public transportation agency of any kind. McCook is served by the Atchison, Topeka & Santa Fe Railroad with only one train each way daily.

The evidence shows that Joliet is a growing industrial city having about seventy thousand people within its corporate limits, and its immediate environs. It is the county seat of Will county, an important trading center and located in the so-called Chicago area. It draws travel from all directions. It is built up with homes and industries, among other places, extending out some distance on Broadway (state bond issue Route 4) beyond any transportation agency. There is much travel between Joliet and Chicago and from a portion of those traveling between the cities there is a demand for motor coach transportation. Located about three miles from Joliet on state bond issue Route 4 is the new Illinois state penitentiary, known as Statesville. At present there are housed there some
P.U.R.1928E.

two thousand convicts, and those who have occasion to visit this institution, and there are many ordinarily, have no public means of transportation. The territory approximately as far North as the Cook county line is largely agricultural, but it is developing and will probably soon be opened for subdivision purposes. In Cook county, there are three country clubs along state bond issue Route 4, and those attending have no means of reaching them excepting by private conveyances, and the evidence shows that daily many resort to taxi service at a high cost to get to and from the clubs.

Beginning at what is known as Hodgkins there are industries employing hundreds of men who are in need of public transportation to go to and from their work. These employees live largely north, east and west and would be served by the proposed bus line and by transferring to and from the Lyons branch of the Chicago & Joliet Electric Railway. Located within half a mile on each side of the highway after leaving the Joliet territory up to Lyons, there are 197 residences and the population in that territory alone, including the employees in the industries, is approximately one thousand, two hundred and fifty-four. Located along the route are a number of schools and many of the children attending them now have to walk long distances. A motor coach line would furnish needed transportation to these children.

[1] The territory all along the route between Joliet and Lyons has been much retarded by the lack of transportation facilities, but recently there have been a number of subdivisions laid out and many lots sold and the erection of residences is only being delayed, pending some kind of transportation agency. A motor coach line would aid materially in the development of the territory.

Immediately along Lawndale avenue, along which extends the Chicago and Joliet Electric Railway Company between Summit and Lyons, the territory is built up largely in a residential way and is developing easterly from such avenue. In the territory east of Lawndale avenue and westerly of the city
P.U.R.1928E.

of Chicago there are approximately one hundred thousand people. In Chicago there are approximately three million people and practically all the way from Chicago to Lawndale avenue is a highly developed, closely congested territory with the exception of the territory east of Lawndale avenue and west of Harlem avenue. This territory is developing westerly from Harlem avenue which is served by the Chicago & West Towns Railway Company, and easterly from Lawndale avenue which is served by the Chicago & Joliet Electric Railway Company.

The evidence shows that the people residing along the territory sought to be served by the Chicago & Joliet Transportation Company are demanding and are in need of transportation service, as are also prospective home seekers who intend to build along the road. This territory is admirably suited for residential purposes. The evidence shows that of the prospective motor coach riders in the territory there would be many who would transfer at Lawndale avenue either to or from the Lyons branch of the Chicago & Joliet Electric Railway Company.

Based upon a careful investigation of the territory, the officials of the Chicago & Joliet Transportation Company estimate an initial revenue of \$65,700 per year, and an operating expense of \$59,860, making a net revenue of \$5,840. The Commission finds this is a fair estimate.

The Commission finds from the evidence that the public convenience and necessity does not require the establishment of motor coach service between Joliet and Chicago, upon and along state bond issue Route 4A, and does require the establishment of such service between Joliet and Chicago upon and along state bond issue Route 4, with certain restrictions hereinafter to be mentioned.

From Joliet to Bloomington, along Route 4, it is 92.8 miles. There are eighteen communities along the road with a total population of 93,458. A list of the towns with their populations and the distances between them, made up from the evidence, is as follows:

P.U.R.1928E.

	Road Distance	Population 1920 Census	Population 1925 Estimated
Joliet	0.0	38,442	40,327
Elwood	9.4	212	212
Wilmington	16.7	1,384	1,384
Braidwood	21.2	1,297	1,297
Godley	23.6	83	83
Braceville	24.9	303	393
Gardner	28.1	937	937
Dwight	37.3	2,255	2,300
Odell	45.1	1,069	1,086
Cayuga	50.1	75	75
Pontiac	55.4	6,665	6,951
Livingston County Home	59.8	—	—
Ocoya	61.8	50	50
Chenoa	66.8	1,311	1,311
Ballard	70.8	—	—
Lexington	74.8	1,301	1,301
Towanda	83.3	404	404
Normal	88.8	5,143	5,143
Bloomington	92.8	28,725	30,204
Total		89,655	93,458

The road passes through some of the richest farmland in the state and in the country between the towns there are bordering the road approximately two hundred, seventy-five houses, eight schools and two churches. Joliet on the north is a large community with many factories; Bloomington on the south is nearly as large and also has many industries—a chief one being the shops of the Alton Railroad. In the intervening territory there is a grain elevator at almost every station and a great deal of livestock is shipped out over the railroad. There are some mills and factories along this route. Including Joliet, Bloomington, and the intervening territory, there are nearly sixty grade schools, fifteen or twenty parochial and private schools, a number of high schools and a junior college at Joliet; Normal and Bloomington are educational centers; at Normal is the Normal State University, and at Bloomington the Illinois Wesleyan and Illinois State Normal University, as well as a number of musical and trade schools. The evidence indicates that there would be considerable use made of a motor coach line along the portion of this route not now served.

The Chicago & Alton Railroad has served this territory since the middle of the last century and has a present investment of some seventeen millions of dollars in this part of its plant
P.U.R.1928E.

and equipment. The Bloomington, Pontiac & Joliet Railway Company was a traction line formerly giving some service in this territory, but it was unable to meet the competition of the automobile and the hard road, and has gone out of business. Through the Gadberry Transportation Company and the Ritter Motor Bus Company, now owned by the Alton Transportation Company, bus service is already established over fifty-four miles of this route; from Joliet South to Wilmington and from Pontiac South to Bloomington, these companies have furnished bus service under certificates granted June 24, 1924 and November 24, 1925. It is proposed, subject to the approval of this Commission, to abandon the service of these companies in event a certificate is granted the Alton Transportation Company. No other common carriers furnish any direct transportation in this territory, although there are some that cross the route.

It appears from the evidence and the Commission finds that public convenience and necessity require that the entire territory between Joliet and Bloomington be served by motor bus transportation.

From Bloomington to Springfield, state bond issue Route 4 traverses a rich farming community. There are eleven towns between the two terminals, their population and distances from one another being shown on the following table:

	Road Distance	Population 1920 Census	Population 1925 Estimated
Bloomington	0.0	28,725	30,204
Shirley	5.9	200	200
Funk's Grove	9.8	50	50
Wilecox	12.0	—	—
McLean	14.6	697	697
Atlanta	19.3	1,173	1,173
Lawndale	23.0	167	167
Lincoln	29.4	11,882	12,327
Broadwell	36.6	209	209
Elkhart	40.5	457	457
Williamsville	46.1	652	652
Sherman	50.5	148	148
Springfield	58.5	59,183	62,936

The territory is highly developed and travel is extensive. In Bloomington, as has already been discussed, are a number P.U.R.1928E.

of educational institutions. In Lincoln, the Lincoln College, the Lincoln Business School, the Odd Fellows' Home, and a school for feeble-minded children, occasion extensive travel. Springfield is both county seat and state capital, and of course draws people to it in large numbers for a variety of reasons. The intermediate towns are farming communities, the residents of which have occasion to go to all three of the other towns frequently.

The Chicago & Alton Railroad has been serving this territory since 1855. It now furnishes twelve trains a day, serving Bloomington and Springfield, eight a day serving Lincoln. This Commission in Cases Numbered 17944, 17946, and 17984 has recently authorized the discontinuance of one local train each way between Bloomington and Springfield. This will leave the towns of Shirley, Funk's Grove, and Lawndale with one Southbound train very early in the morning and with one Northbound train in the afternoon. The Illinois Traction, Incorporated, has a service between Lincoln and Springfield of eleven trains each way a day. It appears from the testimony of the witnesses from this territory that there is a public need for a supplementing of the service given by these two rail carriers. The Commission finds that public convenience and necessity require the establishment of motor bus transportation in this district.

Between Springfield and Carlinville (46.2 miles) are eight communities with a total population of 81,974, as is shown by the following table:

	Road Distance	Population 1920 Census	Population 1925 Estimated
Springfield	0.0	59,183	62,936
Chatham	10.5	848	939
Auburn	17.8	2,660	3,083
Thayer	22.3	1,254	1,375
Virden	25.0	4,682	5,023
Girard	29.6	2,387	2,635
Nilwood	34.3	449	473
Carlinville	46.2	5,212	5,510
Total		76,675	81,974
P.U.R.1928E.			

Springfield is the largest and is the center for trade, legal affairs, business, politics, and sight-seeing for a considerable territory, including the district on the South as far as Carlinville. Farming and coal mining are the chief industries. Nearly every community has a grain elevator and there are large coal mines in practically all of these towns. Carlinville has several factories and is the county seat of Macoupin county.

The Chicago & Alton Railroad has served this territory for seventy-five years, and the hard road has been built parallel to its tracks. The Illinois Traction System also parallels the hard road and the tracks of the Alton. The Alton has 12 trains daily serving Springfield and territory south of it. Carlinville has 8 Alton trains daily, 4 each way, and the intermediate towns have 4 trains each day, 2 each way, with the exception of Chatham and Thayer, which have 3 a day. The traction company has 26 trains a day serving Springfield, and 22 serving Carlinville, but some of these trains do not stop at all intermediate points.

Many witnesses from the territory here involved indicated that the flexible service rendered by a motor bus company would be of great benefit to the public. From this and other evidence, the Commission finds, that public convenience and necessity requires the establishment of motor bus transportation in this territory.

The Carlinville-Venice territory is covered by 59.5 miles of state bond issue Route 4, which is joined at Mitchell by state bond issue Route 3. Included in this territory is the city of Edwardsville, with a population in excess of five thousand, which is the county seat of Madison county. In addition to having several large industries located in Edwardsville, there are a large number of its residents who work in the industries in Granite City, Madison, and Venice, and from the evidence it appears that there is a demand for bus service along this route. The population of the towns between Carlinville and Venice and the distance from one town to another is shown by the following table:

P.U.R.1928E.

	Road Distance	Population 1920 Census	Population 1925 Estimated
Carlinville	0.0	5,212	5,510
Gillespie	12.9	4,063	4,263
Benld	15.4	3,316	3,416
Sawyerville	16.3	650	700
Staunton	22.2	6,500	6,700
Hamel	31.2	100	125
Edwardsville	39.2	5,336	5,336
Mitchell	48.2	50	75
Nameoki	51.2	1,181	1,231
Granite City	53.9	14,757	17,184
Madison	54.8	4,996	5,146
Venice	56.9	3,895	3,985

It also appears that from the evidence that Venice, Madison, and Granite City are large industrial centers, located in Madison county, and that applicant, Illinois Traction, Incorporated, in addition to its interurban railway service, has been operating motor coaches in interstate passenger business between Edwardsville and St. Louis, along said bond issue Route 4, and that not only residents of these cities, but people living along this route and in the tri-cities, have petitioned said applicant to stop its busses so that they may have the benefit of local service between these cities. It further appears from the evidence that Illinois Traction, Incorporated, is the only utility seeking a certificate, which is or has been furnishing direct service between Carlinville, Edwardsville, and Venice through its interurban railway service, and that it is the purpose of such applicant, if granted a certificate, to co-ordinate the proposed bus service in this territory, for the purpose of giving service to the ban service. Illinois Traction, Incorporated, also made proof of the large investment it has in its interurban railway service in this territory, for the purpose of giving service to the public. It also appears from the evidence that for many years the Illinois Traction, Incorporated, has been doing most of the passenger business along this route between Carlinville and Venice, and particularly between Edwardsville and the tri-cities.

The Commission finds that public convenience and necessity require the establishment of motor bus service between Carlinville, Edwardsville, Granite City, Venice, and intermediate points (except for local service between Mitchell and Granite City).

P.U.R.1928E.

In Case No. 16073, Illinois Traction, Incorporated, also asks for a certificate of convenience and necessity between the cities of Staunton, Mt. Olive, Litchfield, and Hillsboro, and between the city of Springfield and the town of Riverton. It appears from the evidence that the interurban railway of this applicant serves the territory between Springfield and Riverton, and also between Staunton and Hillsboro, both of these being branch lines; that the hard road between Springfield and Riverton at some points is several miles from the interurban railway, which leaves the residents of that territory without sufficient transportation to and from the city of Springfield, and that there is a demand for bus service between Springfield and Riverton and between Staunton and Hillsboro.

The Commission finds from the evidence that public convenience and necessity require that motor bus service should be furnished between Springfield and Riverton, and intermediate points, along state bond issue Route 10, and also between the cities of Staunton and Hillsboro, and intermediate points, along Route 16.

[2] During the hearings some time was devoted to the question of whether or not local bus service along the various sections of the routes would meet the needs of the public, or whether in addition to such local service, there should be through service between the various sections and along the entire route. The problem is not easy, but after a careful consideration of all the evidence, the Commission is of the opinion that through service should be furnished. The evidence shows that none of the routes will support more than one bus line operating in a given territory.

The difficulties in this consolidated case arise not from a determination of the question of public convenience and necessity, but from determining which of the many applicants should render the service desired. The present case concerns an important transportation route in Illinois, a route that is the center of a populous and prosperous district. It is worth noting that the oldest utility serving this territory is the Chicago & Alton Railroad, and that that railroad has been rendering service for upwards of seventy-five years. When it was first built

the railroad was a great magnet, developing its territory, and causing the location and building up of towns. The Alton's investment between Chicago and East St. Louis is many millions. Its importance to the communities it serves is not limited to passenger service. It renders mail and express and freight service—and it is to be noted that all three of these services are essential and necessary to this territory.

Illinois Traction, Incorporated, also renders mail, package, express, and freight service, which increases its usefulness to the public. This company and its predecessors were built in the territory between Lincoln and Venice at the beginning of this century, and have been serving the public since that time. The Chicago & Joliet Electric Railway Company built into the territory along state bond issue Route 4A and Lawndale avenue more than twenty years ago. At that time the territory at the North end of the line was undeveloped and the building of this line aided largely the development of the territory to what it is today. Now it is thickly populated and this company has an investment in the territory of several millions of dollars.

[3] The constantly increasing use of the automobile for the transportation of persons and property has made serious inroads upon the revenue of the steam and electric railroads throughout the country. It is apparent from the evidence offered in this case that the existing rail carriers now operating in this field cannot long withstand serious competition from independently operated motor coach lines. The public would be injured by permitting companies not now in the field to compete with carriers whose business has been thus jeopardized through the increased use of the automobile. It thus becomes the duty of this Commission to prevent, so far as it is possible to do so, the duplication of facilities and economic loss which would result from permitting motor bus transportation to be inaugurated in this territory by independent companies, in competition with the existing carriers. Some of the electric lines, not only in this state, but throughout the country, have failed and ceased to do business. All of the railway companies that are concerned in this case as applicants admit difficult

ties in making both ends meet, and concede that the future holds some terrors for them. These considerations, however, cannot be conclusive in this case. The introduction of a new form of transportation almost invariably is followed by economic waste, and there has been such waste following upon the building of electric interurban lines. It is the desire of this Commission to prevent, so far as it is possible to do so, a similar extravagance of development, duplication of facilities, and waste of ultimate wealth in the inauguration of motor bus transportation.

The introduction of automotive transportation on a large scale in this country has had a profound effect upon rail carriers. It has caused a loss in passengers running as high as from thirty to forty per cent during the past ten years. This has resulted in serious loss. Nevertheless, the rail carriers are endeavoring to meet the situation with all available means. The Alton Railroad, which is materially concerned with this territory, has a three-fold policy designed to meet the changing conditions. The first factor of this policy is the establishment of the best through trains that it can run; the second is to maintain trains rendering a purely local service at the highest possible point of comfort and efficiency. Based upon what appears to be sound economical reasoning, the Chicago and Alton is endeavoring, however, to replace the latter trains, where possible, with a rail motor car—a plan that is working effectively and which now results in the operation of eight such cars in Illinois. Likewise, it appears that Illinois Traction, Incorporated, has expended large sums for new rolling stock in the establishment of fast through trains with modern equipment, to serve the comfort and convenience of its passengers. The Chicago & Joliet Electric Railway Company has also made notable improvements in its service and equipment and has kept pace with the demands and needs of the public in the territory served by it.

The latest instrumentality which has been available for improvement of service is the motor bus. Illinois Traction, Incorporated, and Chicago & Joliet Transportation Company both operate busses at present under authority of this Commission,
P.U.R.1928E. , 32

using this service in conjunction and co-ordination with the rail service of the electric lines. Satisfactory motor bus service has been instituted by the Alton between Jacksonville and East St. Louis and through subsidiary companies in part of the territory between Bloomington and Joliet. Many advantages will accrue from co-ordination of service such as is proposed by the Alton Transportation Company, the Illinois Traction, Incorporated, and the Chicago & Joliet Transportation Company to the public. The Alton and the Illinois Traction, Incorporated, propose operations along Route 4 where that road immediately parallels the tracks, as to the one company The Chicago & Alton Railroad Company, and as to the other, of its own electric line. The evidence shows that schedules will be co-ordinated so that the bus service will supplement the rail service but will not usurp its proper place. And there can be no doubt that the schedules of these two carriers will be so arranged that the busses will be feeders for their through trains —a service that no independent company could be expected to interest itself in or work for, except to the extent that it will attract passengers to its busses alone.

[4, 5] Practical operating and managerial benefits from the operation of busses by railroads or electric lines are many. Men experienced in the transportation problems of the territory affected are available. Stations are maintained at nearly all of the communities served. The station agents of these carriers are residents of the respective towns served and are in touch with the transportation needs of their respective communities. Facilities for the storage, handling, and transfer of baggage are already available at practically all of the points on their lines. They are possessed of their own telegraph or commercial telephone lines, which are available for this bus service, and which may be used without interfering with rail operations. Throughout this territory these companies have a large force of employees of all classes, from transportation experts to section crews, who are available for service. No independent company could acquire such complete equipment without a prohibitive investment, and without such equipment no independent company could render the economical and ef-

P.U.R.1928E.

ficient service that the companies now engaged in the transportation business would be able to render.

The evidence shows that at the present time the Chicago & Joliet Transportation Company is operating six coach lines in the city of Joliet and its environs. These lines are all operated in connection with and co-ordinated with the service and facilities of the Chicago & Joliet Electric Railway Company, which renders street railway service in the city of Joliet and its environs, in addition to its electric line between Joliet and Chicago, as hereinbefore referred to. Its managers and officers are all men of long years of experience in the transportation and public utility business, including a number of years of experience in motor coach operations, and in event a certificate is granted in this case, it is proposed to carry on the same co-ordination of service between all of its motor coach lines, including the one in question, and all of the service of the Chicago & Joliet Electric Railway Company, including the service on the Lyons branch extending from Lyons to Summit.

The present authorized capital stock of the Chicago & Joliet Transportation Company is \$150,000, and of this amount \$80,300 had been issued at the time of the hearing or was about to be issued, in pursuance of an order of this Commission. The stock of this company as well as the stock of the Chicago & Joliet Electric Railway Company is all owned by the Central Illinois Public Service Company, a large and extensive and financially strong public utility, operating in the state of Illinois. It is estimated that an additional initial capital of \$65,000 will be required to put in operation the proposed motor coach line, and the Central Illinois Public Service Company, as shown by the evidence, stands ready to furnish this and any other necessary finances.

It appears that the Illinois Traction, Incorporated, is able to finance its proposed operations. The Alton Transportation Company has an authorized capital stock of \$80,000, of which \$62,000 has been issued under authority of this Commission. The resources of the Receivers of the Chicago & Alton Railroad Company, who own the stock of the Alton Transportation Company, are large and their credit excellent. It appears that

P.U.R.1928E.

the Alton Transportation Company will be able to finance its proposed operations.

Such is the situation of the carriers now giving service in this territory. This Commission is committed to a policy of protection to existing carriers so long as they stand ready, willing and able to give the public the service needed. These carriers stand in such position. We said in *Re Kipp's Express & Van Co.* (June 26, 1923, P.U.R.1923E, 249, 256) :

"It has been the policy of this Commission not to issue a certificate of convenience and necessity to a new form of transportation in any field where there was a present transportation utility operating unless the present transportation facility either refused, failed, or was unable to render reasonably adequate transportation service in the field occupied. It is undoubtedly the duty of any transportation company when appearing as an intervener objecting to a new form of transportation from this Commission, to show either that it is fully occupying the field and furnishing adequate transportation service, or that it will immediately adequately serve the public in the field it occupies. It is equally the duty of a petitioning transportation company as a part of its case to show its ability to furnish all of the transportation facilities necessary, and particularly where it seeks to replace a present transportation facility to show that if such facility is replaced by the new service the public necessity will be better served than at present.

"There is undoubtedly a field for motor transportation. The continued filing with this Commission of petitions for certificates of convenience and necessity by motor transportation companies to enter into competition with railroad companies, plainly shows this Commission that the motor transportation service can no longer be ignored by steam railroad and electric interurban companies, but that the economic question must now be answered whether railroads intend to fill the field served by their lines with the most modern and most convenient service, *adopting and co-ordinating motor transportation service in so far as it may assist in better serving the public within the field occupied by them* either by popularizing and extending express service or by their own efforts in their freight service, P.U.R.1928E.

or whether they intend to meet motor transportation as a competitor."

In Re Egyptian Transp. System, P.U.R.1928A, 43, 52, we said:

"Changing economic conditions in the manner of conduct of modern business, the tendency of persons living in crowded cities to change their places of residence to points contiguous to the hard road system of Illinois, and the automobile and its economic use in modern transportation, are all matters which must be considered in cases similar to that presented by the record herein. If public transportation service is to advance and keep pace with changing conditions, the Commission in the consideration of this case, as well as the careful analysis of all of the records of the Commission in relation to transportation facilities in Illinois, is convinced that some effective method must be devised to protect the transportation furnished by railroad companies within its proper sphere, and at the same time retain an effective remedy which will supply the needs of the people of the state of Illinois."

The protective policy of this Commission has been expressly approved by our supreme court in Egyptian Transp. System v. Louisville & N. R. Co. 321 Ill. 580, P.U.R.1926E, 275, 281, 282, 152 N. E. 510, where it is said:

"Railroads have permanent road-beds and trackage which require an outlay of millions of dollars and which in turn yield large revenue to the people of the state. The average bus line is incorporated for a comparatively small sum. The railroad is of vastly greater financial responsibility. This is a matter of substantial public interest, particularly in cases of accident. It is the established policy of the law in this state that a public utility be allowed to earn a fair return on its investments. It is, therefore, not only unjust but poor economy to grant to a much less responsible utility company the right to compete for the business of carrying passengers by paralleling its line unless it appears that the necessary service cannot be furnished by such railroad. Appellants offer to provide whatever increase in accommodations and service is deemed essential to meet the public convenience and necessity. It is P.U.R.1928E,

but consonant with our law regulating public utilities that they be given opportunity to do so. It is argued that appellants cannot give the necessary service except at a large loss. Such argument is beside the question involved in the proceedings before the Commission in this case. Appellants have stated that they are willing and able to give such service, and it appears clear that the Commission is not justified in granting a certificate of convenience and necessity to a competing line until the utility in the field has had an opportunity to demonstrate the truth of its statement and to give the required service.

"To authorize an order of the Commerce Commission granting a certificate of convenience and necessity to one carrier though another is in the field, it is necessary that it appear first that the existing utility is not rendering adequate service. (West Suburban Transp. Co. v. Chicago & W. T. R. Co. 309 Ill. 87, P.U.R.1923E, 150, 140 N. E. 56.) The method of regulation of public utilities now in force in Illinois is based on the theory of a regulated monopoly rather than competition, and before one utility is permitted to take the business of another already in the field, it is but a matter of fairness and justice that it be shown that the new utility is in a position to render better service to the public than the one already in the field. (Chicago Motor Bus Co. v. Chicago Stage Co. 287 Ill. 320, P.U.R.1919D, 157, 122 N. E. 477.) It is in accord with justice and sound business economy that the utility already in the field be given an opportunity to furnish the required service. The Commerce Commission, under the Public Utilities Act, has power to require additional service, and in the absence of a showing that the public interest would be better served by granting a certificate to an entirely new and competing utility, such certificate should not be granted until it be determined whether the utility already in the field can meet the requirements of public convenience and necessity. The power of the state to regulate a utility carries with it the power to protect such utility against indiscriminate competition, and such power should be exercised to that end."

See, to the same effect, Chicago Motor Bus Co. v. Chicago P.U.R.1928E.

Stage Co. 287 Ill. 320, P.U.R.1919D, 157, 122 N. E. 477; West Suburban Transp. Co. v. Chicago & W. T. R. Co. 309 Ill. 87, P.U.R.1923E, 150, 140 N. E. 56; Superior Motor Bus Co. v. Community Motor Bus Co. 320 Ill. 175, P.U.R. 1926C, 685, 150 N. E. 668; Illinois Power & Light Corp. v. Commerce Commission, 320 Ill. 427, P.U.R.1926C, 690, 151 N. E. 236; Bartonville Bus Line v. Eagle Motor Coach Line, 326 Ill. 200, P.U.R.1927E, 333, 157 N. E. 175; Re Alton Transp. Co. (Consolidated, 15038, 15248, 15658, 15937, 16142, September 15, 1926.)

The courts and Commissions of other states, when they have been confronted with similar questions, have reached similar conclusions, with a unanimity that indicates the soundness of this policy. The supreme court of appeals of West Virginia, in the recent case of Monongahela West Penn Pub. Service Co. v. State Road Commission, — W. Va. —, P.U.R. 1928B, 161, 166, 139 S. E. 744, 747, has said:

"The appellees make no claim to exclusive charter right or specific legal or statutory grant of priority of right to preempt bus service on our highways. Their position may be summarized as follows: The railroads perform certain vital services to the public which bus companies cannot perform, and, therefore, must be preserved; the railroads have large investments, and, to make adequate returns thereon as well as to maintain their roads, equipment, and service properly, need all the income available under present rates and conditions; competitive bus companies will divert a material amount of travel from the railroads, thereby diminishing the revenues of the latter; reduced revenues will necessarily cause one of two things, (a) rates will be raised to meet the loss thus occasioned, or (b) the efficiency of railroad service will be impaired; either contingency will seriously affect the general traveling public, but these contingencies may be avoided by permitting the railroads or their subsidiaries to render and receive the emoluments from the bus service, which would otherwise be competitive; because of greater resources the railroads afford greater security to the public in performing bus service than that offered by the ordinary bus companies; and the interests of the public will, therefore, be better served by P.U.R.1928E.

giving the existing carriers the preference over other applicants for certificates of convenience.

"The argument of the railroads has met the approval of court and Commission."

This decision quotes with approval from the Egyptian Transportation System Case, 321 Ill. 580, P.U.R.1926E, 275, 152 N. E. 510, and cites in support of its decision: Washington R. & Electric Co. v. Washington Rapid Transit Co. (D. C.) P.U.R.1922C, 754; Re Blue & Gray Bus Line (Utah) P.U.R.1924A, 449, in which it is said that railroads have a "natural preferential right to extend service instead of permitting competition by an auto bus company." Two recent decisions of the supreme court of Ohio sustain this policy: Cincinnati Traction Co. v. Public Utilities Commission, 112 Ohio St. 699, P.U.R.1926A, 338, 148 N. E. 921; East End Traction Co. v. Public Utilities Commission, 115 Ohio St. 119, P.U.R.1926D, 642, 152 N. E. 20.

In an able and well-considered opinion of Chairman Gurney of Maine Public Utilities Commission in *Re Maine Motor Coaches*, P.U.R.1926B, 545, it was said at page 554:

"We have been drawn to the conclusion that the welfare and convenience of the people of the state, as a whole, should counterbalance the local advantage that may be brought to some of our citizens by the abandonment of the principle of restricted competition set forth in decisions of this Commission, and the Commission and courts of other states, to which reference will later be made.

"The question ought to be determined upon the basis of whether the rights, welfare, and interest of the general public will be advanced by the prosecution of the enterprise, and not upon the private benefit or advantage that may accrue to any particular person or community. *Re Motor Transit Co.* (Cal.) P.U.R.1922D, 495, 500; *Re Alabama Power Co.* (Ala.) P.U.R.1923E, 828, 832; *Re Paradox Land & Transport Co.* (Colo.) P.U.R.1923E, 759, 761.

"The Commission believes, moreover, that where additional transportation facilities are needed, they should be furnished by existing transportation agencies, either street railways or P.U.R.1928E.

motor bus lines, rather than by the licensing of new companies, particularly where local transportation is necessary. Washington R. & Electric Co. v. Washington Rapid Transit Co. (D. C.) P.U.R.1922C, 754, 757."

And again, at page 561:

"The petition, J. No. 219, proposing service from Harrison to Portland and return, passing through and serving Bridgton, Naples, South Casco, Raymond, North Windham, Windham Center, and Westbrook, presents an especially interesting problem because of the fact that The Samoset Company, a subsidiary company whose stock is owned in its entirety by the Maine Central Railroad Company, which is likewise the owner of the Bridgton & Saco River Railroad Company operating between Harrison and Bridgton Junction, at which point it connects with the Maine Central Railroad for Portland, has presented a petition for authority to operate a public service motor car between Harrison and Portland.

"We feel constrained to the conclusion that it is wiser in a case of this kind to grant the certificate to the steam railroad whose experience in operation, whose responsibility, financial resources, and permanency are established. It should be considered that this is a new route and no one at present has the consent of the state to operate between Harrison and Naples. While other applicants have applied for the same route, no certificate from this Commission has been granted, and it is our opinion that the general welfare will be enhanced by a denial of the petition in the instant case, and by its issuance to the Samoset Company."

In this opinion are collected decisions of Commissions and courts of twenty-seven states in harmony with its policy. There are many other cases in which it has been held that existing utilities should be granted certificates of convenience and necessity in preference to independent operators. Some of these cases also point out the advantages of co-ordination of service that result from bus operation by existing utilities or their subsidiaries. The following cases support these statements: Re Paradox Land & Transport Co. (Colo.) P.U.R.1926A, 116 (subsidiary of interurban railroad); Re Indianapolis Street R. Co. (Ind.) P.U.R. P.U.R.1928E.

1926C, 96 (subsidiary of street railway company); Re Maine Motor Coaches (Me.) P.U.R.1926B, 545 (subsidiary of railroad company); Re Chopp (Utah) P.U.R.1926D, 541 (subsidiary of railroad company); Re Fort Dodge, D. M. & S. Transp. Co. (Iowa) P.U.R.1926C, 19; Re Simms-Great Falls Freight Service (Mont.) P.U.R.1926C, 818; Re Penny (Mont.) P.U.R. 1926E, 633; Public Service R. Co. v. Mayr (N. J.) P.U.R. 1926E, 352; Re Stephens (S. D.) P.U.R.1926B, 209; Re Martsfield (S. D.) P.U.R.1926D, 108; Re Aselton (R. I.) P.U.R. 1926E, 370; Re Bamberger Electric R. Co. (Utah) P.U.R. 1926E, 472; Re Wyoming Valley Auto-bus Co. (Pa.) P.U.R. 1925D, 332; Re Wentworth (N. H.) (anno.) P.U.R.1927A, 105; Re Northern Arizona Stages (Ariz.) P.U.R.1927A, 818; Re Rudy (Iowa) P.U.R.1925D, 743; Re Weiner (Me.) P.U.R. 1925B, 357; Re Bush (Pa.) P.U.R.1925C, 1; Re Bly (Pa.) P.U.R.1925D, 71; Re Oswald (Mont.) P.U.R.1927A, 753; Re Newport Electric Corp. (R. I.) P.U.R.1925E, 309; Re Wyoming Transp. Co. (Wyo.) P.U.R.1925E, 861.

These considerations suggest the conclusion that should be reached as to all independent applicants concerned in this case. The existing utilities hold themselves out, and we find that they are, as ready, able and willing to furnish all transportation necessary in their respective territories. They have come to this Commission with a concrete plan for such additional transportation service in the form of motor busses. These carriers assert that to allow an independent company to come into their territory would be to deprive them of business and revenue, and thus to limit their ability to serve the public in other ways. There can be no question that such a result would follow upon the establishment of service by an independent operator. The carriers, on the other hand, have large investments, and in so far as the granting of a certificate to an independent company would limit the usefulness of those investments, there would be an economic waste which it is the policy of this Commission to prevent. The independent applicants in this case have not given us any grounds for making an exception to the policy above outlined.

The Peoria Bus Transportation Company, seeking a certificate between Dwight and Bloomington, put in no evidence save the ex-P.U.R.1928E.

hibits attached to its original application. Of the fifty-five miles sought to be entered, thirty-seven are now served by the Ritter Line, owned by the Alton Transportation Company. The record fails to disclose any reason that would justify its entry into this field. Its application should be denied.

The evidence shows that the Inter-City Motor Transportation Company which, as before stated, seeks a certificate from Chicago to Joliet along state bond issue Route 4, doing business solely between the cities of Joliet and Chicago, is organized with an authorized capital stock of \$20,000. The company or any of its officials or stockholders are not now engaged in any public transportation service in or near the territory sought to be entered, and in comparison with the Chicago & Joliet Transportation Company, have had little or no experience in the transportation business, and comparatively speaking, have little or no financial ability to make a success of the operation of a bus line between Chicago and Joliet.

The record before this Commission in the present case does not show that a certificate of public convenience and necessity should issue to the Mohawk Stage Lines Corporation to operate between Joliet and Chicago, and its application in that respect should, therefore, be denied. This finding, however, is on the present record alone and is without prejudice to any action this Commission may take in another proceeding now being had on the application of the Mohawk Stage Lines Corporation, Docket No. 17162.

In Docket No. 14267, Gadberry Transportation Company seeks authority to operate motor busses from Wilmington to Dwight and also to South Wilmington. The stock of this company is owned by the Alton Transportation Company, and as we have already stated, it is the intention of Alton Transportation Company if and when given a certificate to operate between Joliet and Bloomington, to discontinue, subject to the approval of this Commission, the operation now being conducted by Gadberry Transportation Company. In this order we have granted a certificate to Alton Transportation Company to operate from Joliet to Bloomington. This includes most of the route over which Gadberry Transportation Company in Docket No. 14267
P.U.R.1928E.

seeks to operate busses. Accordingly, the application of Gadberry Transportation Company for a certificate of public convenience and necessity should be denied.

[6] So far as application of the St. Louis-Chicago Motor Transit Company is concerned, it may be said that this company failed to introduce sufficient evidence which would warrant the issuance of a certificate of convenience and necessity to it. It has been engaged in interstate operation between St. Louis and Chicago at different times and was enjoined by the state courts when it attempted to engage in intrastate operation without a certificate from this Commission. However, the evidence of its financial ability to operate a motor coach line in this territory is insufficient to warrant our granting a certificate to it. Its application should be denied.

The remaining independent applicant is the Tri-State Company. This company is not engaged in operating a utility in the field sought to be covered by these applications, except from Springfield to Old Salem. This company comes before the Commission with a capital of \$5,000 paid up by property and cash, and an amendment to its charter authorizing an increase in the capital to \$50,000. The company, however, through its representatives, testified that in its opinion it would require a capital of at least \$250,000, to engage in the bus business in the territory covered by its application. From the standpoint of ability to finance the proposed operation and to render adequate, permanent, and satisfactory service to the public, we believe that Illinois Traction, Incorporated, the Alton Transportation Company, and the Chicago & Joliet Transportation Company are superior to the Tri-State Bus Company, and each of the other applicants, and the application of that company as well as the applications of the other independent companies should be denied. We believe this action will best serve the interests of the public.

[7, 8] Motions were filed asking that the applications of the Alton Transportation Company and of Illinois Traction, Incorporated, be dismissed on the ground that these companies are acting *ultra vires* in endeavoring to operate motor busses.

The Alton Transportation Company, it is shown by the record, was organized by the receivers of the Chicago & Alton Railroad P.U.R.1928E.

Company. Its charter gives it power to operate busses and there can be no question as to its power to engage in such business. The receivers are the officers of the United States District Court for the Northern District of Illinois, Eastern Division, in which the receivership proceedings are pending. That court has authorized the receivers to organize the Alton Transportation Company, and the various committees of creditors and bondholders have approved the action. There can be no question that under this authority the receivers had the power to organize the company and that incidental to such authority they have power to hold its stock. We are not disposed to quarrel with the right of the Federal Court to take such action.

Illinois Traction, Incorporated, is a corporation, formed under the Railroad Act of this state. The written motion hereinabove referred to seeks to raise before this Commission the question as to whether it has the right to operate a motor coach line in connection with its railroad business. To meet that objection, however, Illinois Power & Light Corporation, which is the parent company and owner of Illinois Traction, Incorporated, filed its application to operate in the same territory covered by the application of Illinois Traction, Incorporated, in the event that this Commission should determine that Illinois Traction, Incorporated, did not possess the right under the laws of this state to engage in the bus business.

We seriously question, however, our jurisdiction to determine what are the charter rights of Illinois Traction, Incorporated, so long as it is endeavoring to carry on a transportation business which is apparently within the scope of its charter. The determination of charter rights is a judicial question over which this Commission has no jurisdiction. (People ex rel. Board of Administration v. Peoria & P. Union R. Co. 273 Ill. 440, P.U.R. 1916E, 795, 113 N. E. 68; Re Metropolitan West Side Elevated R. Co. P.U.R. 1924A, 488; Re Bloomington & N. R. & Light Co. P.U.R. 1922E, 770.)

We are, however, inclined to the view that the operation of motor busses in the manner proposed by Illinois Traction, Incorporated, is merely incidental, but properly so, to the main business of the company. We are, nevertheless, of the opinion

P.U.R. 1928E.

ion that the question raised by the written motion is not within our jurisdiction to determine and can only be raised by a direct proceeding initiated by the State's Attorney or Attorney General acting under authority of law. No doubt this Commission has authority to deny an application which shows upon its face that the applicant corporation is neither a utility nor authorized to engage in such business. This is not such a case, however, and we believe it is outside the province of this Commission to determine the precise scope of corporate powers.

The apportionment of the territory between the existing utilities already in the field presents the only remaining question, and that is a question involved only in the territory between Lincoln and Carlinville. Here the line of Illinois Traction, Incorporated, parallels that of the Alton. We do not think this territory will support two bus lines. From all of the evidence in the record, we are of the opinion that the public interest will be best served by granting the certificate to the Alton Transportation Company between Bloomington and Carlinville, and denying the application of the Illinois Traction, Incorporated, in that territory. The Alton Transportation Company has asked this Commission to dismiss its application for a certificate between Carlinville and Mitchell, and an order will here be entered so dismissing it. Illinois Traction, Incorporated, serves this territory and public convenience and necessity requires that it be given the certificate to operate motor busses between the Carlinville and Venice, except however, between Mitchell and Granite City.

The Alton Transportation Company has also asked for a certificate of public convenience and necessity to carry on the busses that it proposes to operate, newspapers, cut flowers and other small parcels. Its proposal, as shown by the evidence, is that no parcel or package other than newspapers or cut flowers will be accepted for transportation which weighs more than five pounds, is valued at more than \$10 or whose length, width, or height exceeds eighteen inches. Illinois Traction, Incorporated, also makes a similar request. It appears from the evidence that the handling of such articles will serve a public need, and that public convenience and necessity require that parcels and packages which we have

P.U.R.1928E.

just described be carried in connection with the operation of the busses of these two companies.

[9] We have already indicated that public convenience and necessity require the issuance of certificates of public convenience and necessity to Chicago & Joliet Transportation Company, Alton Transportation Company and Illinois Traction, Incorporated, to serve locally certain designated territories along the route here under consideration. We have also indicated that it is our opinion that through busses should be operated. We believe that it would be in the public interest that the through bus service be furnished by these companies which furnish the local service. The Alton Transportation Company and Chicago & Joliet Transportation Company have already indicated in this proceeding their willingness to enter into a joint agreement looking to the establishment of through service. The Commission will expect these two companies and Illinois Traction, Incorporated, to file with this Commission for its approval within twenty days hereafter an operating agreement, in which it is provided that through bus service will be furnished along the entire route between Chicago and Venice. In the event that these companies fail so to do, this Commission reserves the right on the motion of any of the parties to this proceeding, or on its own motion, to vacate this order and to re-open this case.

Neither the Alton Transportation Company nor Illinois Traction, Incorporated, applied for a certificate of public convenience and necessity to do a local business within the corporate limits of any of the municipalities along the routes over which they desire to operate busses. Illinois Traction, Incorporated, did not desire to do any strictly local business between Mitchell and Granite City and intermediate territory. Chicago and Joliet Transportation agreed not to receive any passengers east of Desplaines river in entering the city of Chicago, nor to receive any passengers in leaving the city of Chicago whose destination is at any point east of the Desplaines river. Accordingly the certificates of public convenience and necessity issued to these companies will be so restricted.

The Commission having considered the evidence both oral and
P.U.R.1928E.

documentary, and being fully advised in the premises, finds that this Commission has jurisdiction of the parties and of the subject matter of this proceeding; that public convenience and necessity require the operation of motor vehicles for the transportation of persons and baggage for hire on, over and along state bond issue Route 4 between Chicago and Joliet, Illinois, and the operation of motor vehicles for the transportation of persons, baggage, and parcels between Joliet, Bloomington, Lincoln, Springfield, Carlinville, Venice and intermediate points (except as to a certain restrictions), said route and said restrictions being more particularly set forth in the record of this case; that a certificate of public convenience and necessity should be granted to Chicago & Joliet Transportation Company for the operation of motor coaches for the transportation of persons and baggage for hire, on, over and along state bond issue Route 4 between Chicago and Joliet and intermediate points and along the routes as herein-after stated and as hereinafter restricted; that a certificate of public convenience and necessity should be granted to Alton Transportation Company, for the operation of motor coaches for the transportation of persons, baggage and parcels for hire on, over and along state bond issue Route 4 between Joliet, Bloomington, Lincoln, Springfield and Carlinville and intermediate points, and along the route as hereinafter set forth and as hereinafter restricted; that a certificate of public convenience and necessity should be granted to Illinois Traction, Incorporated, for the operation of motor coaches for the transportation of passengers and baggage and parcels for hire, on, over and along state bond issue Route 4 between Carlinville, Gillespie, Staunton, Edwardsville, Granite City, Madison, and Venice as hereinafter set forth and hereinafter restricted.

The Commission further finds that a certificate of public convenience and necessity should be granted to the Chicago & West Towns Railway Company, for the transportation of persons upon, over and along state bond issue Route 4 between Harlem avenue and the Desplaines river.

The Commission further finds that a certificate of public convenience and necessity should be granted to Illinois Traction, Incorporated, for the operation of motor coaches for the trans-

P.U.R.1928E.

portation of persons, baggage and parcels upon, over, and along state bond issue Route 10 between Springfield and Riverton.

The Commission further finds that a certificate of public convenience and necessity should be granted to Illinois Traction, Incorporated, for the transportation of persons and parcels upon, over, and along state bond issue Route 16 between Staunton, Mt. Olive, Litchfield, and Hillsboro, and intermediate points.

The Commission further finds that General Order 116 of the Commission and the requirements of the statutes of the state of Illinois should be made a part of this order and strict compliance therewith should be required; and that all other petitions and intervening petitions in the aforesaid cases should be denied.

NEW JERSEY BOARD OF PUBLIC UTILITY COMMISSIONERS.

HORN & HARDART BAKING COMPANY

v.

PUBLIC SERVICE ELECTRIC & GAS COMPANY.

Rates — Electricity — Off-peak lighting service.

A baking company was permitted to receive lighting service under a wholesale power rate where the company's schedule did not provide that the customer should take off-peak service exclusively.

[September 27, 1928.]

PETITION by a baking company to use current for lighting, business purposes, and heating appliances under wholesale power rate; granted.

Appearances: Emerson L. Richards for Horn & Hardart Baking Company; George H. Blake for Public Service Electric and Gas Company.

By the Board: The petitioner states that it has been using electric power to operate motors, heating appliances and electric current for lighting at its Broadway premises in the city of Camden; that for its power load it has been billed under the company's commercial power service or retail power rate, set forth in Appendix I hereto; that for current used for lighting P.U.R.1928E.

it has been billed under the company's uniform lighting schedule; that by reason of the amount of current consumed by it, the manner and times of its consumption, the purpose for which it is used, the installations and all the circumstances surrounding the petitioner's use of current, it is entitled to be served under the respondent's wholesale power rate schedule; that the company's provisions with respect to the latter schedule require that the total connected installation or load in rated capacity of motors and lights must exceed 50 horse power; that the rated capacity of the connected lights must not exceed 50 per cent of the total connected installation or load; that the total connected installation or load in rated capacity of motors and lights exceeds 50 horse power as required under the aforesaid conditions, and is 65.57 kilowatts or 82 horse power; and that the rated capacity of the connected lights does not exceed 50 per cent of the total connected installation or load and the total capacity of connected lights is 24.13 kilowatts and is, therefore, only about 37 per cent of the total connected installation.

The respondent is willing to serve the petitioner under said wholesale power schedule for current used for power purposes, but is unwilling to extend this schedule to include the energy used for lighting. In Exhibit R-1 the company shows the connected load of the petitioner as of July 10, 1928 was 57.45 horse power, and in Exhibit R-3 shows that the complainant was billed from August 1927 to July 1928, inclusive, for a maximum demand of 31.2 horse power, and on Exhibit R-4 the lighting load was shown to be 17.4 kilowatts or 23.2 horse power. The combined rated load, as shown by these exhibits, therefore, aggregated 54.4 horse power or approximately forty and eight tenths kilowatts.

The company's reason for refusing to serve the petitioner for its lighting service under the wholesale power rate was that the customer was not an industrial or manufacturing concern; that under this broad classification, on the average, customers did not take service on the company's peak load and therefore, on the average, were off-peak customers. While it is probably true that this contention is correct, the schedule itself does not provide that the customer shall take such off-peak service exclusively
P.U.R.1928E.

and it is a matter of common knowledge that many factories work overtime and, therefore, their use would come on the peak load of the lighting service which the company claims occasions its annual peak load; and during the periods of such use they would be in the same class as the petitioner.

While the petitioner is concerned only with the application of the rate schedule to its own requirements, the Board is concerned with the company's rate schedule as it applies to customers with similar characteristics over its entire system. Pending the determination of this matter the Board deemed it necessary to ascertain the effect that the rate in question would have on all others similarly situated and the consequent effect on the company's revenues. As a result of this investigation and because the petitioner is entitled in the light of the testimony taken in this case to relief, the company at the instance of the Board has filed a new schedule which is attached hereto and designated Appendix II. This schedule provides that customers with 60 kilowatts or over in connected load of lighting and power combined, when the power load is 25 per cent or more of the total connected load and the contract is not less than one year, shall have available to them the following rates:

Nine cents per kilowatt hour first 30 hours use of demand per month.

Five cents per kilowatt hour next 60 hours use of demand per month.

Two cents per kilowatt hour excess of 90 hours use of demand per month.

The method of ascertaining the demand is fully set forth in Appendix II. A study of this schedule indicates that this substantially meets the complaint of the petitioner and places it in the class of rates that its application sought. In addition thereto it makes it available, by increasing the maximum lighting load to 75 per cent and establishing the minimum power load at 25 per cent, to customers who heretofore did not have available this class of rates. Under the rate schedule which the petitioner sought to make applicable to it, it would have been necessary for the Board to establish a demand charge of \$3 per P.U.R.1928E.

horse power for lighting service during four months of the year. This is not necessary under the rate schedule now filed and the proposed schedule, in the Board's opinion, is much more satisfactory for customers whose characteristics of use of light and power are somewhat similar to the petitioner's.

The Board finds and determines, therefore, that the rate schedule filed by the respondent is applicable to the petitioner and that said schedule will be allowed to become effective, to remain in effect until such time as a study of the results thereof may indicate that it should be changed.

Appendix I.

Retail Power Rate.

1st step—9 cents per kw. hr. for consumption to each month up to and including an amount equal to 20 kw. hr. per H. P. of maximum demand.

2nd step—5 cents per kw. hr. for the next 50 kw. hr. consumed in excess of the first step.

3rd step—4 cents per kw. hr. for the next 500 kw. hr. consumed in excess of the 1st and 2nd steps.

4th step—2 cents per kw. hr. for all consumption in excess of the 1st, 2nd, and 3rd steps.

Plus a coal clause.

Appendix II.

Large Lighting and Power Rate (Optional).

Availability

Customers with 60 kilowatts or over in connected load of lighting and power combined, when power load is 25 per cent or more of the total connected load and contract is not less than one year.

Rate

Nine cents per kw. hr. first 30 hours use of demand per month.

5 cents per kw. hr. next 60 hours use of demand per month.

2 cents per kw. hr. excess of 90 hours use of demand per month.

P.U.R.1928E.

Determination of Demand

By measurement or estimate.

Measurement: highest average number of kilowatts recorded in 30 minutes' period in the month.

Estimate: the sum of the lighting and power demands separately determined as follows: Lighting—75 per cent of connected load. Power—same as retail power rate.

Coal Clause

Same as retail power rate.

Minimum Charge

Two dollars per kilowatt monthly of customer's total connected load in lighting and power.

INDIANA PUBLIC SERVICE COMMISSION.

RE EXTENSIONS OF ELECTRIC SERVICE.

[General Order No. 9519.]

Service — Extensions — Preliminary license.

A general order was made requiring any party desiring to construct or operate any electric property for public service to submit to the Commission for its approval a description of the entire project before attempting to collect money from prospective patrons for connection charges, or taking any other procedural steps.

[September 21, 1928.]

GENERAL ORDER applying to persons or concerns desiring to construct and operate electric properties for public service.

By the Commission: On account of the fact that confusion has arisen in the past in many places in the state of Indiana in the matter of making extensions of facilities to supply rural electric service, it has been deemed necessary by the Public Service Commission of Indiana to establish certain general principles which shall govern the construction and maintenance of rural electric transmission lines in the future.

In many places in the state, persons desiring to engage in speculative enterprise have, without either engineering experi-

P.U.R.1928E.

ence or financial ability behind them, come into many rural communities in the state, and by misrepresenting the facts, have collected money from unsuspecting persons for so-called "connection charges" for connecting them to electric transmission lines which have never been started. In certain instances they have either failed to build lines which would supply satisfactory service or have built them in such manner as to constitute a menace to the lives and safety of the people generally. In most cases money enough to pay for the entire cost has been donated by prospective patrons.

Several of these lines now exist. In one place in Rush county the lines which are built are designated by the engineering department of the Public Service Commission as being extremely dangerous. In another place in Shelby county money was collected from various persons for which no transmission line was ever built, nor is there a prospect at this time that one will ever be.

To prevent a repetition of these practices, the Public Service Commission of Indiana finds that from and after the passage of this order a certain form of procedure should be followed by persons desiring to engage in this form of utility business.

Singleton, Ellis, Harmon, McCardle, McIntosh, Commissioners, concur.

COLORADO PUBLIC UTILITIES COMMISSION.

RE U. S. AIRWAYS, INCORPORATED.

[Application No. 1192, Decision No. 1935.]

Certificate — Airplanes — Interstate carriers.

An application for a certificate of convenience and necessity for the transportation of passengers and express by airplanes in interstate commerce must be granted, upon condition of compliance with state regulations, without determining the question of public need, in view of the Interstate Commerce Clause of the Federal Constitution and the laws of the state.

[October 2, 1928.]

P.U.R.1928E.

APPLICATION of airplane carrier for certificate of convenience and necessity; granted.

Appearances: Francis J. Knauss, Denver, for applicant; D. Edgar Wilson, Denver, for the Chicago, Rock Island & Pacific Railway Company.

By the **Commission**: This is an application for a certificate of public convenience and necessity authorizing the applicant to operate lines of airplanes for the carrying of passengers and express matter for hire between Denver, Colorado, and Kansas City, Missouri, in interstate only. No protests were filed against the application.

This matter was set down for hearing in the hearing room of the Commission, State Office Building, Denver, Colorado, on September 21, 1928, at which time evidence in support of the same was received.

The applicant is a corporation organized and existing under and by virtue of the laws of the state of Delaware, with a capitalization of \$300,000, and, as stated by counsel for applicant, will qualify to do business in the state of Colorado and will furnish to the Commission a certified copy of the articles of incorporation, as well as of the certificate authorizing it to do business in the state of Colorado.

The applicant proposes to engage in the business of transporting passengers and express between Denver, Colorado, and Kansas City, Missouri, by means of airplane. Arrangements have been made with the city and county of Denver to use its municipal airport as soon as the same is completed. Operation will not commence until about January 1, 1929. There is no common carrier airplane service offered to the public between Denver and Kansas City at this time.

The applicant proposes to purchase four Fokker Super-Universal monoplanes, each carrying six passengers and one pilot. The investment necessary to purchase these planes is approximately eighty thousand dollars, and financial arrangements have been made to purchase said planes.

The Commission will adopt for the present as its standards of equipment and qualification of pilots the standard prescribed
P.U.R.1928E.

by the Federal Government and the Colorado Commission of Aeronautics, and require the applicant to file proof that it has or will comply therewith.

This being an interstate operation only the question of public convenience and necessity is not involved, and need not, therefore, be determined.

After a careful consideration of all the evidence, the Commission is of the opinion, and so finds, that the Constitution of the United States and the laws of the state of Colorado require that a certificate of public convenience and necessity be issued to the applicant herein for the transportation of passengers and express, by airplane, between Denver and the Denver-Kansas state line, in interstate commerce only.

WASHINGTON SUPREME COURT.

COLUMBIA RIVER TELEPHONE COMPANY

v.

DEPARTMENT OF PUBLIC WORKS.

[No. 21062.]

(— Wash. —, 269 Pac. 6.)

Valuation — Failure to allow for going concern — Statutes.

1. A valuation of a telephone utility which failed to make any allowance for going concern value was held upon appeal to be correct where all the other elements enumerated by a statute, which did not specify such allowance, were given proper consideration, p. 521.

Valuation — Going value — Previous decision.

2. A previous unanimous decision of the court, holding in a rate fixing proceeding that the department need not allow any value for going concern by virtue of a state statute, was held to be controlling in the determination of whether or not such an allowance was necessary in a general valuation proceeding, p. 524.

Constitutional law — Due process — No going value.

3. The failure of the Department in the valuation of its telephone utility to make an allowance for going concern, but proceeding in accordance with the elements enumerated for its consideration by a state statute, was held not to be a deprivation of property without due process of law, in contravention of the Federal and state Constitutions, p. 525.

[July 19, 1928.]

P.U.R.1928E.

En banc. APPEAL by telephone utility from a valuation order of the Department of Public Works; order affirmed.

Appearances: Cleland & Clifford, of Olympia, for appellant; John H. Dunbar and H. C. Brodie, both of Olympia, for respondent.

Parker, J.: The appellant telephone company seeks in this court reversal of a judgment of the superior court for Yakima county, affirming an order of the State Department of Public Works finding and fixing the value of appellant's public service property; appellant contending that, in so far as the Department refused to consider and add to the valuation of its property a substantial amount based upon so-called going concern value, its order is erroneous and prejudicial to appellant.

[1] The Department refused to consider going concern value as an element in the value of appellant's public service property, manifestly because of the Department's view of the provisions of § 10441, Rem. Comp. Stat., under which it was proceeding in making the valuation. That section, in so far as we need here notice its language, reads as follows:

"The Commission [now the Department of Public Works] shall ascertain, as early as practicable, the cost of construction and equipment, the amount expended in permanent improvements, and proportionate amount of such permanent improvements charged in construction and to operating expenses respectively, the present as compared with the original cost of construction, and the cost of reproducing in its present condition the property of every public service company.

"It shall also ascertain the amount and present market value of the capital stock and funded indebtedness of every public service company. . . .

"It shall also ascertain the total market value of the property of each public service company operating in this state used for the public convenience within the state. . . .

"It shall also ascertain the probable earning capacity of each public service company under the rates now charged by such companies and the sum required to meet fixed charges and operating expenses. . . .

P.U.R.1928E. ,

"It shall also ascertain the density of traffic and of population tributary to every public service company, and the conditions which will tend to show whether such traffic and population is likely to continue, increase, or diminish. . . .

"It shall also ascertain whether the expenditures already made by any public service company in procuring its property were such as were justified by the then existing conditions, and such as might reasonably be expected in the immediate future and whether the money expended by such company has been reasonable for the present needs of the company and for such needs as may reasonably be expected in the immediate future.

"The Commission is hereby authorized to cause a hearing or hearings to be held at such time or times and place or places as the Commission may designate for the purpose of ascertaining the matters and things provided for in this section.

"The Commission shall, before any hearing is had, notify the company concerned of the time and place of such hearing, by giving at least thirty days' written notice thereof, specifying that at the time and place designated a hearing will be held for the purpose of ascertaining the value of such company's property within the state, which shall be a sufficient complaint to authorize the Commission to inquire into the matters designated in this section.

"All companies affected shall be entitled to be heard and introduce evidence at such hearing. The evidence introduced at such hearing shall be reduced to writing and certified under the seal of the Commission.

"The Commission shall make and render findings of fact in writing covering all matters in this section mentioned concerning which it is directed to inquire into, and shall make findings upon all matters concerning which evidence may have been introduced before it shall tend to show the value of the property used by such company for the public convenience."

That section further provides for a review in the superior court of the Department's findings and fixing of value, and correction thereof by that court, if found by the court to be "unfair, unwarranted, or unjust," and for appeal from the decision of the superior court thereon to this court, and further provides that
P.U.R.1928E.

the findings of the Department, or as they may be finally by the courts corrected or directed to be corrected, "shall be conclusive evidence of the facts stated in such findings as of the date therein stated under conditions then existing, . . . and such facts can only be controverted by showing a subsequent change in conditions bearing upon the facts therein determined," and further provides that the Department shall, "from time to time, cause further hearings to be had for the purpose of ascertaining the betterments, improvements, additions, and extensions made by any public service company to its property subsequent to the date of any prior hearing."

This is not a rate-fixing proceeding, though its final determination may furnish evidence pertinent to some future inquiry looking to the change of appellant's present established rates charged and collected by it. It is manifestly because the final determination of this proceeding will be evidence of the value of appellant's public service property, as of the date of the valuation so made, that appellant seeks to have now included therein a substantial amount as going concern value.

It will be noticed that § 10441, Rem. Comp. Stat., specifies in considerable detail the elements of value of public service property to be considered and determined by the hearing therein contemplated. It does not specify going concern or good will value as an element to be so considered. The Department concededly proceeded accordingly, ignoring going concern value as an element to be included in its determination. Following recitals and findings touching these several statutory specified matters of inquiry, the Department made its final order as follows:

"Order.

"From the foregoing findings of fact, the Department concludes, and its order is:

"1. That the fair value for rate-making purposes of the respondent's property as of December 31, 1925, exclusive of working capital, is \$50,603.66.

"2. That a reasonable allowance for working capital as of December 31, 1925, is \$2,300."

No contention is here made that this determination by the
P.U.R.1928E.

Department is "unfair, unwarranted, or unjust," other than that the Department erroneously excluded consideration of going concern value. It seems to us that our unanimous en banc decision in Pacific Coast Elevator Co. v. Department of Public Works, 130 Wash. 620, P.U.R.1925B, 618, 622, 228 Pac. 1022, is decisive against appellant's contentions here made. While that was a rate-fixing proceeding, the valuation of the public service property there drawn in question was determined by the Department in the manner prescribed by the statute above quoted, and excluded consideration of going concern value. Holding, in view of that statute, this to be a lawful method of so measuring the value of the public service property there in question for rate-making purposes, Judge Fullerton, speaking for the court, said:

[2] "The first of the questions in controversy is whether the Department, in ascertaining the values of the several properties involved, on which it based its schedule of permissible charges, pursued a proper method of valuation. The method adopted by the Department is what is commonly termed the prudent investment method. The Department ascertained the sums of money prudently invested by the owners in the properties, and, using the sums so found as a rate base, formulated a schedule of charges which, based on the normal amount of business transacted, would yield to the owner a sum slightly in excess of 10 per centum on the investment. The method pursued by the Department was the method which we approved in State ex rel. Spokane v. Kuykendall, 119 Wash. 107, P.U.R.1922D, 467, 205 Pac. 3. We there pointed out that this was not only the method of ascertaining the value of property for rate-making purposes uniformly pursued by the Department in its former practices, but was the method required by the statute under which the Department derived its powers.

"The appellant contends, however, that this method of valuation violates the 14th Amendment to the Constitution of the United States; that the rule under that amendment requires that property be valued for rate-making purposes as of the time when the inquiry is made, and must be taken at its then market value as a going concern. A number of cases are cited from the S.P.U.R.1928E.

preme Court of the United States as maintaining the rule, three of which, namely, Missouri ex rel. Southwestern Bell Teleph. Co. v. Public Service Commission, 262 U. S. 276, 67 L. ed. 981, P.U.R.1923C, 193, 43 Sup. Ct. Rep. 544, 31 A.L.R. 807; Georgia R. & Power Co. v. Railroad Commission, 262 U. S. 625, 67 L. ed. 1144, P.U.R.1923D, 1, 43 Sup. Ct. Rep. 680, and Bluefield Water Works & Improv. Co. v. Public Service Commission, 262 U. S. 679, 67 L. ed. 1176, P.U.R.1923D, 11, 43 Sup. Ct. Rep. 675, were determined since the determination of our case of State ex rel. Spokane v. Kuykendall, *supra*. There is, however, a distinction between the cited cases and our own case. In the cited cases the statutes governing the regulatory bodies did not prescribe the rules by which the property of the utilities under consideration was to be valued, and the regulatory bodies and the courts were left free to adopt such a rule of valuation as would best accord with the justice of the case. In this state, as we have shown, the statute has not left the Department or the courts free in this respect. It has in itself prescribed the rule. Whether this difference will be regarded by the authoritative court as a sufficient justification for the rule so adopted remains yet for determination. But until it is so determined we feel constrained to follow the statute."

We see no reason for here holding that decision as not controlling in this case, because of the fact that this is a valuation case and that was a rate case, as counsel for appellant suggest we should. Indeed, it seems that there would be more reason for including going concern value in the valuation of public service property in a rate case, where the final determination actually fixes rates, than in a simple valuation case, as this is, where the final determination does not fix rates, but only becomes evidence which may be used in some future rate proceeding.

[3] It is contended in behalf of appellant that the findings and order of the Department "constitutes a deprivation of the property of appellant without due process of law, in contravention of the Federal Constitution, art. 14, § 1, and the State Constitution, art. 1, § 3." There was some evidence presented to the Department upon the hearing, in the form of opinion testimony, P.U.R.1928E.

to the effect that the valuation of appellant's public service property should be augmented by an item of \$10,000 as going concern value. The Attorney General did not offer any evidence touching going concern value, resting upon the theory, as the Department in effect ruled, that going concern value had no place in the inquiry. It is difficult for us to see how the valuation placed upon the public service property of appellant by the Department in this proceeding has the effect of depriving appellant of its property without due process of law, in violation of constitutional guaranties, since the findings and order do not compel any reduction in or fix the service rates chargeable by appellant. No one has asked for, nor has the Department made or threatened to make, any change in the present fixed service rates charged and collected by appellant. However, even though the findings and order of the Department should be considered as having the far-reaching effect of ultimately controlling in the Department's fixing of appellant's rates, the above quotation from our decision in *Pacific Coast Elevator Co. v. Department of Public Works, supra*, seems to us decisive against this constitutional contention made in behalf of appellant.

We conclude that the valuation order of the Department and the judgment of the superior court affirming that order must be affirmed. It is so ordered.

Fullerton, C. J., and Mitchell, Main, Tolman, Holcomb, Askren, French, and Beals, JJ., concur.

MISSOURI PUBLIC SERVICE COMMISSION.

RE PICKERING COAL COMPANY et al.

[Case No. 6029.]

Railroads — Clearance — Statutory construction — "Impracticable" defined.

A statute providing certain overhead railroad clearance except where "impracticable" was construed to have been passed with the intention of exempting such overhead structures as were not passed by locomotive power, but under which cars were passed by pinch-bars thereby avoiding the necessity of employees riding on car roofs.

[September 22, 1928.]

P.U.R.1928E.

APPLICATION of a coal company and a railroad company for authority to reduce statutory clearances in the construction of a coal chute; granted.

Porter, Commissioner:

I.

This case is before the Commission upon the application of the Pickering Coal Company and the Atchison, Topeka & Santa Fe Railway Company, hereinafter called the Applicants, for authority to construct a coal chute at Swanwick, Missouri, with less than the statutory overhead clearance of 22 feet. Protest was filed by the Brotherhood of Railroad Trainmen, hereinafter called the Protestants. The case was heard on August 30, 1928, at the offices of the Commission in Jefferson City, Missouri, and was submitted on the record. At this hearing the Atchison, Topeka & Santa Fe Railway Company was represented by C. L. Mason and M. B. Holmes, the Pickering Coal Company by George Pickering, and the protestants by D. W. Peters.

This case was consolidated for hearing with Case No. 6021 and the same testimony made applicable to both. The application and the testimony of witnesses for the Applicants show that it is desired to construct a tipple or chute for the coal company's use in the conduct of its business at its mine at Swanwick, Missouri. At the mine the railroad company will construct a spur track running generally north and south and passing under said chute. To the west of this and connected by switches to said spur track will be another spur track. The chute will be so constructed that coal hoisted from the shaft to the tipple will pass over a screen in the conduct of its business at its mine at Swanwick, Missouri, less into cars on said spur track. The larger coal will pass over and along an apron which can be raised or lowered into cars sitting on the west track aforesaid. The chute will be of heavy steel construction and will have lateral clearances from the center line of the two tracks of 8 feet, 6 inches. The apron aforementioned can be raised so that there will be no structure of any kind above the west track. Over the east track the structure will have a clearance of 14 feet, 6 inches.

Witnesses for the Applicant testified that the 6-inch coal and P.U.R.1928E.,

smaller, which fell through the screen into the first cars, was purchased by the railroads as slack coal. The railroads in purchasing this coal demanded that there should be a certain amount of lump coal therein. It was testified that the coal mined was of the type known as soft coal, and that should it be dropped from a greater height than the 14 feet, 6 inches mentioned, it would pulverize it so as to render it less salable.

It was testified that the method of placing cars under the chute would be as follows:—That all cars to be passed under the chute would be pinched into position by the Applicant's employees. After loading, the cars would be pinched from under the chute and towards the main line where the locomotive would pick them up. At no time would any of the cars be pushed under the chute by the locomotive.

The Protestants placed no witnesses on the stand. In cross examination the attorney for the Protestants brought out the fact that from a purely constructional standpoint, it was not impracticable to build the chute with a 22-foot clearance.

II.

In the published Session Acts designated as Laws of Missouri, passed at the session of the 53rd General Assembly, 1925, on Page 323, there is given the act prescribing uniform clearances. Section 1 of said acts reads as follows:

"Except in cases in which the Public Service Commission finds that such construction is impracticable, bridges, viaducts, tunnels, overhead roadways, foot-bridges, wire or other structure hereafter built over the track or tracks of a railroad or railroads by a county, municipality, township, railroad company, or other corporation, firm or person, shall be not less than twenty-two feet in the clear from the top of the rails of such track or tracks, to such wire or other structure or to the bottom of the lowest sill, girder or crossbeam, and the lowest downward projection on the bridges, viaduct, tunnel, overhead roadway or footbridge."
(Italics our own)

There have been many cases before the Commission in which there arose the question of the intent of the legislature in its use of the word "impracticable." There can be no question
P.U.R.1928E.

that it was the intent of the legislature to render more safe the operation of trains upon the railroads of the state. In the present instance and under the method of operation as outlined by witnesses for the Applicants and undisputed by any testimony from the Protestants, there will be no necessity for any trainman or other person to be on the top of one of the cars as it passes under the proposed chute.

Webster's New International Dictionary gives as one of the definitions of the word "impracticable" the following: "Incapable of being used or availed of; as an impracticable road; an impracticable method." To raise the chute higher would be impracticable because it would defeat one of the purposes for which the chute is designed, that is, the extraction from the mine run of coal of a slack coal that would be salable to railroads and other parties.

The Commission is of the opinion that the application of the word "impracticable" to the construction of the chute, as applied in the application herein, is within both the spirit and the letter of the law as passed by the General Assembly. It believes that any other interpretation would be contrary thereto and an absurdity. It is of the further opinion that the application herein should be granted.

Brown, Chairman, Ing, Calfee and Hutchison, Commissioners, concur.

MARYLAND PUBLIC SERVICE COMMISSION.

CHARLES G. BALDWIN et al.

v.

CHESAPEAKE & POTOMAC TELEPHONE COMPANY
OF BALTIMORE CITY.

[Case No. 2801.]

Commissions — Jurisdiction over telephone directory.

1. The publication of telephone directories, including the classified business section, is subject to the approved rules and regulations on file with the Commission, p. 531.

Return — Revenue and expense of telephone directories.

2. Revenues and expenses pertaining to the publication of directories, including all advertising, are regularly reported to the Commission and the income therefrom is considered in the fixing of rates for telephone service, p. 531.

Discrimination — Accidental error — Telephone directory listing.

3. Accidental errors in telephone directory listing which the utility promises to correct at the earliest opportunity does not constitute sufficient basis for a claim of unlawful discrimination, and the Commission will not issue an order requiring the company to correct such errors, p. 531.

[October 9, 1928.]

COMPLAINTS by various telephone subscribers against alleged irregularities in the publication of directory listings; complaint dismissed.

Appearances: Charles G. Baldwin, for the complainants; Bernard Carter & Sons, Marbury, Gosnell & Williams, William L. Marbury, Jr., and Dozier A. DeVane, for the Chesapeake & Potomac Telephone Company of Baltimore city.

By the Commission: The complainants, Charles G. Baldwin, W. H. Snell, Mrs. H. Hubner, A. Lowther Forrest, and W. Horace Harper filed a joint petition with the Commission on July 5, 1928, in which it was prayed that an order be passed by the Commission assuming jurisdiction over the publication of all of the defendant's telephone directories and advertising business; that the telephone company be required to proceed at once to publish an authorized edition of all directories after due notice in the daily papers and individual notice to subscribers; that such edition be officially recognized by order of the Commission and that no change be permitted therein except upon written authority filed in duplicate with the telephone company and the Commission, or upon order of the Commission; that the directories be revised and republished at least once in every six months; that the income from the publishing of directories be considered in fixing rates for telephone service; that the Commission determine the amount of damages suffered by the complainants and order payment by the defendant.

The complainants, in support of these prayers, cited their in-P.U.R.1928E.

dividual experiences, having to do with the fall issue of 1927 and the summer issue of 1928 of the directory for Baltimore City.

The defendant filed answer on July 26, 1928, admitting fault only to the extent of accidental errors in the directory listings and denying that there had been unfair discrimination against any of the petitioners. Defendant, at the same time, filed a motion that the Commission dismiss the petition for the reason that it did not state facts sufficient to support any relief.

Argument on the motion to dismiss was heard on September 25, 1928.

The petition would seem to indicate that the complainants were apparently uninformed as to the extent of the jurisdiction now exercised by the Commission over the publication of the telephone directories. The publication of the directories is subject to approved rules and regulations on file with the Commission, jurisdiction over the classified business section having been expressly assumed by the Commission in 1919. See Case No. 1708, Standard Electric & Elevator Co. v. Chesapeake & P. Teleph. Co. 10 Ann. Rep. Md. P. S. C. 351.

[1] The telephone directory for Baltimore city is revised and reissued twice a year and notice of date of next issue is printed upon the cover. Notice has been given in the newspapers that material for the 1928 fall issue is now being prepared for the printer and the new volume should be in the hands of subscribers about December 1st.

[2] Revenues and expenses pertaining to the publication of directories, including all advertising, are regularly reported to the Commission and the income therefrom is considered in the fixing of rates for telephone service.

The Commission feels that it would be impracticable to exercise more complete supervision of telephone directories than it now does, and that no good purpose would be served by attempting to do so.

[3] The facts stated by the petitioners relative to the alleged errors in individual listings do not, in the opinion of the Commission, constitute a sufficient basis for a claim of unlawful discrimination and while the Commission might issue an order P.U.R.1928E.,

requiring the telephone company to correct such errors, it seems needless to do so after they have been brought to the company's attention and the directory is now in process of revision. The company has assured the Commission that these errors will be corrected in the new issue of the directory and that Mr. Snell will have opportunity to designate the business classification under which the one entry to which he is entitled without extra charge will appear.

It is the conclusion of the Commission that hearing should be had only if the petition be amended in such manner as to state a case of unlawful discrimination resulting from the company's violation of the established rules and regulations or to show that such rules and regulations are unreasonable.

Note.—Commissions.

- I. General powers and duties, 532.*
- II. Powers over managerial questions, 533.*
- III. Rules and regulations, 534.*

I. General powers and duties.

The Alabama Commission's authority is not derived directly from the Constitution of Alabama, but from the statutes which have been passed from time to time by the legislature in pursuance of its constitutional duty and prerogative. Alabama, T. & N. R. Corp. v. Alabama Great Southern R. Co. Docket No. 4969, Sept. 19, 1928.

The Alabama Commission has decided that in exercising its authority under the statutes, the Commission must consider any constitutional provision that is applicable or pertinent to the situation at bar. *Ibid.*

The Alabama Commission is given powers by statute, not only to supervise, regulate, and control generally, in the public interest, the rates, service, and practices of transportation companies (§§ 7629, 9710, Code of 1923), but also the power to require full compliance with the specific duties laid upon such transportation companies by the statutes. *Ibid.*

The duty of the Commission in the exercise of its powers over the rates and service of utilities to enforce sound regulation of motor utilities outweighs the disadvantages accruing to hotel owners, gasoline dealers and other private businesses losing patronage through the elimination of open competitive transportation. *Re Colorado Cab Co. (Colo.) Application Nos. 894 et al., Decision No. 1810, June 7, 1928.*

P.U.R.1928E.

The Commission does not have power to prevent the establishment by persons owning their own telephones and lines, of a private exchange outside the corporate limits of a town. *Re Waterloo Line* (Ind.) No. 9195, March 30, 1928.

The power of regulation is not without limit and is not a power to destroy or compel the doing of a service without reward. *Re Genesee & Wyoming R. Co.* (N. Y.) Case No. 4537, April 11, 1928.

The Commission exercises jurisdiction only over the rates, service, and practices of public utilities, and is not empowered with control over the issuance of stocks and bonds or the fixing of values for taxation, sale, or exchange purposes. *Re West Coast Power Co.* (Or.) U-F-497, P. S. C. Or. Order No. 1602, May 8, 1928.

The law does not authorize the Commission to award damages to industrial shippers for an act of the railroad in entering property off of its right of way and removing track without legal right. *Freas v. Erie & Wyoming Valley R. Co.* (Pa.) Complaint Docket Nos. 7503, 7505, May 1, 1928.

II. Powers over managerial questions.

The Commission has no jurisdiction to make a determination concerning the future operations of an irrigation project, in a proceeding authorizing the transfer of utility properties to the district, since these are matters of policy to be determined by the properly elected and qualified officers of the district. *Re San Joaquin & K. R. Canal & Irrig. Co.* (Cal.) Decision No. 19376, Application No. 13778, Feb. 17, 1928.

Upon a complaint by an applicant, a shareholder in a telephone utility, to the effect that the latter had failed to do certain acts required to be done by the Ontario Companies Act, the Ontario Railway & Municipal Board held that it had no authority to consider such matters as the irregularity of auditor entries, the inaccuracy of annual financial statements, the alleged release of certain sums found owing to the company, the failure of the directors to submit for inventory accounts for toll charges on treasurer's books, or the unauthorized conduct of one of the utility officials. The Board, however, did hold that, in consequence of the failure to give due notice of an annual meeting of the stockholders in accordance with the terms of the before mentioned act, all business transacted at a purported meeting including the election of directors and auditors was invalid. *Davidson v. Mount Albert Teleph. Co.* (Can.) P. F. A. 1026, April 20, 1927.

In *Illinois Commerce Commission v. Illinois Bell Teleph. Co.* (Ill.) Case No. 17343, Oct. 11, 1927, the defendant was cited to appear and show cause why it should not comply at certain exchanges with the Commission's General Order (No. 107) requiring P.U.R.1928E.

it to instruct operators to repeat the number to subscribers before completing connection. The defendant answered that the question was of such a nature that it involved utility management and, therefore, was not within the power of the Commission to regulate. The Commission having given consideration to the record in the case and recognizing that the general order in that respect was subject to modification, found that the citation should be dismissed.

In *Thompson v. Rock Island S. R. Co.* No. 16363, Sept. 21, 1927, the Illinois Commission refused to entertain a complaint of a farmer that the defendant carrier's neglect of line fences resulted in unnecessary danger to his cattle. The Commission found that although the circumstances were practically as stated, an act (July 1, 1874, § 1) specifically provided a remedy for such a situation in a court of competent jurisdiction.

The Commission has jurisdiction to determine whether a grain elevator utility constructing and operating its plant on a certain location in reliance upon a lease from a railroad company should be obliged to surrender the premises upon a cancellation of the lease by the latter without apparent cause or explanation. *Farmers Co-op. Grain & Lumber Co. v. Minneapolis & St. L. R. Co.* (Iowa) File A-4264, May 25, 1928.

The Nebraska Commission, in passing on an emergency fund set aside by telephone companies to absorb losses by sleet storms, stated: "Difference of opinion might readily exist as to whether this policy of the company is advisable; also as to whether the amount set up should be more or less. The Commission feels that it is not of sufficient importance to the issues at hand as to cause it to substitute its judgment for the judgment of the company. It can indeed be said that such a practice does not result in wasting the company's revenues; furthermore, it places the company in a position to readily restore its properties if widespread disaster should destroy them." *Re Farmers Teleph. Co.* Application No. 6982, Jan. 21, 1928.

The Commission is not the proper forum in which to determine the liability of a consumer of utility service where there is an honest dispute concerning the amount due. *Pishnery v. Brownsville Water Co.* (Pa.) Complaint Docket No. 7461, June 12, 1928.

The question of whether a utility business sought to be authorized will have a successful future or whether it will be an unwise venture is a matter to be determined primarily by the applicant proposing such service rather than the Board. *Re Sioux Falls-Brookings Motor Express* (S. D.) Order No. 2164-A, May 9, 1928.

III. Rules and regulations.

The Commission will set aside a previous order with respect to
P.U.R.1928E.

a dangerous subway crossing where it appears that the existence of the order is a menace to the convenience, comfort, safety, and necessity of the public using the highway. *McMahon v. Nickel Plate Road* (Ind.) No. 7964, March 18, 1927.

The Appellate Court of Indiana, en banc, decided that the Commission in exercising powers conferred upon it by statute, must be governed by the rules and principles of the common law which required that such powers shall be exercised in a reasonable manner, and if not so exercised, any rule, order, or ordinance contrary thereto will be by the courts declared void. *Terre Haute, I. & E. Traction Co. v. Puckett*, No. 12815, — Ind. App. —, 158 N. E. 639, Nov. 23, 1927.

The Commission referred to records in the office of the Board of Railroad Commissioners and the Highway Department, upon the consent of all interested parties, and took judicial notice of such information as was obtained therefrom. *Township Board of Clermont Township v. Chicago, M. & St. P. R. Co.* (N. D.) Case No. 2841, Nov. 19, 1927.

ALABAMA PUBLIC SERVICE COMMISSION.

RE CENTRAL OF GEORGIA MOTOR TRANSPORT COMPANY.

[Docket No. 5310.]

Automobiles — Who may operate — Railroads.

1. Railroad companies have as much right as any other companies or individuals to operate motor vehicles for hire where the statutes regulating such motor utilities show no purpose on the part of the legislature to exclude railroad companies or their subsidiaries, p. 539.

Commissions — Certificates — Power of Commissions — Railroads.

2. The Commission has the power, after hearing, to issue a certificate of convenience and necessity to a railroad company or its subsidiary for the operation of motor vehicles where a statute providing for such procedure does not exclude such company, p. 539.

Monopoly and competition — Automobiles — Exclusive rights.

3. The Motor Carrier Act of Alabama does not give the Commission of that state authority to grant a certificate to any motor carrier vesting in him the exclusive right to operate over any route, p. 540.

Automobiles — Operation by railroads and subsidiaries.

4. The question of whether a railroad or its subsidiary should be authorized to operate as a motor carrier over the public highways of the state must be determined by the facts of each case, p. 542.

P.U.R.1928E.

Commissions — Power to determine legislative intent.

5. The Commission has no authority to determine the wisdom of a legislative act placing a matter within the Commission's discretion, p. 542.

Monopoly and competition — Railroads — Automobiles.

Discussion of the respective monopolistic rights of railroads and motor utilities, giving consideration to the investment in each, p. 541.

Automobiles — Right of railroads to operate.

Discussion of the right of railroads or their subsidiaries to engage in the operation of motor vehicles for hire in the absence of express statutory authority, p. 544.

Monopoly and competition — Power of Commission to establish policy.

Discussion of the right of a Commission to establish a public policy in the absence of specific statutory authority, p. 545.

(LEE, Associate Commissioner, dissents.)

[October 3, 1928.]

PETITION by a motor transport company for authority to operate as a motor carrier for the transportation of passengers, baggage, mail, and express; granted.

Appearances: General R. E. Steiner, appearing for the petitioners; D. T. Ware, Attorney, representing Mr. Fred H. Cofield, intervenor; Mr. Hooten, representing the city of Roanoke, intervenor.

Second Hearing

B. C. Jones, representing city of Roanoke and Jones & Huey, Wholesale Grocery Company; Mr. Burns Parker, Attorney, representing the W. A. Handley Manufacturing Company, and the Truline, Inc.

By the Commission: The present report deals only with the above styled petition in so far as petitioner seeks authority to operate as such motor carrier between Opelika and Roanoke, as stated in the petition.

Since the petition was filed and subsequent to the hearings in this proceeding as well as in the related proceeding, which is the petition of the Central of Georgia Railway Company for authority to discontinue its trains Nos. 8, 13, and 14, operating between Roanoke and Opelika, Docket No. 5309, counsel of rec.
P.U.R.1928E.

ord for petitioner, Central of Georgia Transport Company, hereinafter referred to as the "Transport Company" has appeared before the Commission and asked that the Transport Company's petition be amended to provide that its operation instead of conforming to the schedule proposed in the petition, shall be as follows:

Leaving Roanoke at 3 p. m., arriving in Opelika at 4:30 p. m., returning the same evening, leaving Opelika at 8 p. m., and arriving in Roanoke about 9:30 to 10 p. m.

This amendment is asked by petitioner so as to conform with an agreement as to readjustment of operations between Roanoke and Opelika by the Central of Georgia Railway Company, hereinafter referred to as the "Railway Company," and the Transport Company, which agreement was arrived at through conference between officials of said companies and citizens of Roanoke, as set forth in our report in said Docket No. 5309.

As indicated by our report in Docket No. 5309, said adjustment is approved by the Commission and the amendment of the Transport Company's petition is, therefore, allowed.

There is direct relation between petition of the railway company in Docket No. 5309 and the petition of the Transport Company in the present proceeding. All that is set out in our report and opinion in the matter of the railway company's petition, which is applicable to things involved in the present petition of the Transport Company, shall be considered as made a part of our report and opinion in this proceeding of the Transport Company.

Paragraph 7 of the Transport Company's petition is as follows:

"Applicant shows to the Commission that applicant is owned by the same interests that own the Central of Georgia Railway Company, which railway company has been operating passenger service from Opelika to Roanoke and from Eugaula to Ozark many years, and applicant's desire is merely to substitute the same service, schedule, rates, and fares for the passenger trains that this Commission may permit the Central of Georgia Railway Company to discontinue."

The petition of the railway company and that of the Transport
P.U.R.1928E.

Company were heard together upon a common record of evidence. The evidence shows with respect to the railway company's present operations that its passenger trains have been performing for several years a substantial freight service along this branch and that the crews of said passenger trains, or some of them at least, have been performing a switching service for industries and shippers in the towns of Roanoke who are served by the railway company's freight service. Manifestly the Transport Company would not be able to perform that freight service and switching service which had been done by the railway company's passenger trains and hence the Transport Company's proposed operation could not have served to substitute that service which such passenger trains have been performing. The granting of the railway company's petition to discontinue its said passenger trains Nos. 8, 13, and 14, on this branch together with the granting of the present petition of the Transport Company in the absence of a readjustment of the railway company's operations remaining after discontinuance of said passenger trains, would have left the public without transportation by the railway company adequate in all respects to serve the proven demands to the same extent such demands have heretofore been served by the railway company in the matter of freight and switching service.

Apparently appreciative of this situation while this case was pending and after the hearings of evidence had been completed, the officials of the railway and Transport Companies, in conference with the mayor and representative citizens and shippers of Roanoke, worked out an adjustment of the Railway Company's operations, with a change in the proposed operation of the Transport Company which it appears to the Commission, will reasonably serve the existing demands in the case of all the communities along this branch line.

This is the first instance of a common carrier railroad, by itself or its subsidiary, seeking authority from the Commission to transport persons and property for hire as a common carrier over the public roads of the state, and in this case the railway's subsidiary seeks such authority, as shown by the petitions in said Dockets Nos. 5309 and 5310 and by the evidence in the P.U.R.1928E.

case, to enable the rail carrier to effect an economy in operation by substitution, through its subsidiary, of a motor carrier operation, which is shown to be much less expensive and which the evidence tends to show, can better serve the public convenience and necessity within the limits of the motor carrier operation than the rail carrier had been able to do by means of such passenger train operation.

The action of the Commission in these related proceedings is based upon the facts here applicable, and our action is not intended to mean anything except this, namely: that we deem our action in these proceedings to be proper in response to the particular facts proven.

Associate Commissioner Lee dissents from the majority of the Commission upon the grounds shown in his dissenting opinion which is attached to this opinion of the majority. Commissioner Lee takes the position, as we understand his dissenting opinion, that the right of the Transport Company to be authorized to engage in the business of motor carrier under the facts here shown is what he terms a "technical right" growing out of what he deems an omission of the legislature to legislate specifically upon the question of competition between railroads and common carrier motor vehicles."

[1, 2] In the Alabama Motor Carrier Act of 1927 the legislature expressed its views as to who should be permitted to operate over the public roads of Alabama as motor carriers in the transportation of persons and property for hire between fixed termini or over regular routes. Section 2 of said act defines who may become such motor carriers upon complying with the act and there is nothing in said § 2, nor elsewhere in the act, which shows any purpose on the part of the legislature to exclude railway companies or their subsidiaries. The supreme court of Alabama, to whose decisions we must look for guidance in the construction of our Alabama statutes has held over and over again that every statute must be reasonably construed as intended to have that effect which the usual and ordinary meaning of its provisions indicates was intended. No one can say that the usual and ordinary meaning of the language used in this act can be held to exclude the present petitioner from those who may
P.U.R.1928E.

be authorized to operate as motor carriers if they comply with the provisions of the law and the attendant facts and circumstances are such as to justify issuance to them of a certificate of convenience and necessity to carry on such operation. When the facts and circumstances justify the granting of a certificate to any applicant under this act is left to the reasonable judgment and discretion of the Commission, with respect to this § 4 of the act, providing among other things: "The Commission shall have power, after hearing, to issue said certificate as prayed for; or for good cause shown to refuse to issue same, or to issue it for the partial exercise only of said privilege sought. Motor carriers must operate and furnish service in conformity with the current existing terms and provisions of their respective certificates of convenience and necessity."

Any order of the Commission granting or refusing to grant a petition for any such certificate must be reasonable and is subject to review by the courts as in the case of every other order made by it.

The dissenting opinion cites § 103 of the Constitution of Alabama and certain decisions of the courts in support of the views taken. We do not think that either § 103 of the Constitution of Alabama, nor any of the authorities cited are applicable to the present case.

Our decision does not indicate any purpose or intention to grant to the Railway Company or its subsidiaries an exclusive right to operate as a motor carrier over this route. As shown by the facts in the case, there is an existing motor carrier operator operating under certificate from the Commission at the present time over a part of the route to be maintained by the Transport Company. The existing motor carrier operator, however, will not serve a considerable part of the route as shown by such facts.

[3] In fact the Motor Carrier Act does not give the Commission authority to grant a certificate to any motor carrier, vesting in him the exclusive right to operate as such over any route. The act itself is a protection against that monopoly and restraint of competition which the dissenting Commissioner appears to fear may result from the action of the majority in P.U.R.1928E.

this particular case. As a matter of fact, since the beginning of the Commission's administration of the Motor Carrier Act, in the granting of certificates thereunder, we have been unanimous in the view that whether it is sound policy under the act to grant a certificate to more than one motor carrier operator to operate over the same route must be determined from the facts and circumstances existing in each particular case. In some instances we have unanimously granted a certificate to only one operator to operate over important routes. In other cases we have unanimously granted more than one certificate to operators to operate over the same route.

The ability of a rail carrier in the past to acquire and maintain a monopoly of transportation to the extent that it has had a monopoly thereof was due for the most part to the tremendous investment in right-of-way, grading of road-bed, construction and maintenance of track, and in the purchase and maintenance of expensive engines, cars, and other equipment. Upon the coming of improved public roads and the great improvement in motor vehicles, the railroad's monopoly of transportation to the extent that its service could be duplicated by such motor vehicles, has rapidly ceased because such motor carriers do not have to make that heavy expenditure in road-beds and tracks upon which to run and their unit cost of operation falls far below the unit cost of operation of rail carriers in the matter of those services which the motor carriers can reasonably perform.

It is clear, therefore, the majority of the Commission think, that there is nothing here in the law or in the facts upon which to predicate a fear of monopoly or restraint of competition.

In the present case, the majority of the Commission are not left simply to their own judgment as to what is reasonable, what is proper policy, or what is necessary for the public convenience and necessity. As shown by our report in the related case, Docket No. 5309, the people affected who are served, have requested us to permit the railway company to discontinue its said passenger trains and authorize the Transport Company to perform a motor carrier service on the public road running parallel with this branch, which with the adjusted operations of the Railway Company will, in the opinion of the people, serve P.U.R.192SE.

them better as a means of transportation, than they have heretofore been served.

[4, 5] When a railroad or its subsidiary should be authorized to operate as a motor carrier over the public highways of the state, must be determined upon the facts of each case, whether it was wise for the legislature to leave such question to be determined by the Commission is not for us to decide. It has placed such responsibility on us, and there is nothing left for us except discharge of the duty as best we can in the public interest. It is not different from nor more difficult than many similar responsibilities placed on the Commission by the law.

The petition of the Transport Company is filed under the Alabama Motor Carrier Act of 1927 for certificate of public convenience and necessity authorizing the Transport Company to operate as a motor carrier over the route named between Opelika and Roanoke, and in manner and form as stated in its petition as amended. Under § 5 of said act before the Commission's order constituting such certificate is issued the petitioner must file with the Commission and obtain its approval of a bond or policy of insurance as stated in said § 5. Every such bond or policy of insurance shall conform to the regulations prescribed by the Commission in such cases. The requirements respecting such indemnity insurance are set out in *Re Langley Bus Co.*, our Docket No. 4946, and in the supplementary report issued in that case on October 31, 1927.

Under all the evidence, the Commission finds that petitioner is entitled to a certificate of convenience and necessity under said Motor Carrier Act to operate over said route between Opelika and Roanoke, Alabama, in manner and form and for the purposes aforesaid.

Upon the filing of bond or policy of insurance as required by said act, order of the Commission will issue constituting such certificate of convenience and necessity.

Lee, Associate Commissioner, dissenting: As noted in my dissent in the cause under Docket No. 5309, the petition herein was coupled up with another petition by the Central of Georgia Railway Company to abandon certain passenger train operations.
P.U.R.1928E.

While the petitions, themselves, were separately drawn and separately filed, they were treated as one petition by both petitioners in the submission of testimony in support of the changes in service sought to be made by the said Central of Georgia Railway Company. As I understand it, the proposal of the petitioner in the instant cause to operate a motor bus line between Opelika and Roanoke was relied on by the railway as one of the justifying reasons for the granting of its petition to discontinue the operation of passenger trains on its own rails. The majority of the Commission seem to treat the matter in that light, also.

I can readily agree to the proposition that the Commission is now clearly authorized by law to exercise jurisdiction over the question of the abandonment of service by a common carrier railroad. The legislature has specifically legislated upon that subject, and the Commission is not treading upon doubtful grounds of public policy in entertaining and passing upon such petitions.

But the two petitions here under consideration do not present a clear-cut situation of that kind. The Transport Company wants to substitute a motor bus service for a passenger train service on the railway, and the railway urges the Commission to allow that to be done.

This is the first time such a case has come before the Commission. While it has passed upon numerous petitions for the establishment of motor bus lines on the highways, so far as the records of the Commission show, this has always been done by independent operators, that is, operators that had no connection, directly or indirectly, with existing railway lines.

But the petitioner in this case is a corporation "organized and owned by the same interests that own the Central of Georgia Railway Company." It is directed and managed by the same executive officers that direct and manage the railway. While the record before us does not disclose the exact working relationship between the transport company and the railway, it is safe to assume that there is, or will be, some such arrangement, express or implied, between these two carriers. It seems certain to me that so long as the Transport Company is owned by the same in-

P.U.R.1928E.

terests that own the railway, the policies of the management of the railway will dominate the operations of the transport company.

I cannot, therefore, view this matter in any other light than that the railway, itself, is seeking authority to inaugurate a motor bus service on the public highways of the state.

I am unable to concur in the views and conclusions of the majority, for two reasons, namely:

1. I am in some doubt as to the legal right of the petitioner, owned, managed, and directed as it is, to engage in such operations; and,

2. The granting of the petition will initiate a public policy by the Commission without sufficient legislative direction and control.

As I read the report of the majority, they take the position that petitioner has a clear, legal right to engage in motor bus transportation on the public highways. Certainly, their conclusions justify such an inference. But I am not so sure about that.

The Alabama Motor Carrier Act, under which the majority have acted, and under which the petition is filed, creates no affirmative right in any person or corporation, as I construe it, to operate motor busses or trucks on the public highways in common carrier service. Section 4 of that act, which deals with the question of filing petitions for certificates of public convenience and necessity to operate as common carriers on the highways, simply says: "After three months from the going into effect of this act, no motor carrier shall operate for the transportation of persons or property for hire between fixed termini or over a regular route upon any public highway in this state without first obtaining from the Commission under the provisions of this act, a certificate to the effect that public convenience and necessity require such operation." That language, as I construe it, sets up a prohibition against the operation of common-carrier motor busses and trucks on the public highways without complying with certain regulations, but does not actually create any right not otherwise existing in any person or corporation to engage in such operations. It follows, therefore, that if any corporation is not properly authorized by its charter to carry on the business of a
P.U.R.1928E.

motor carrier for hire on the public highways, it could not look to this statute for the creation of such a right. I think it is also true that if there be in existence any independent statute or rule of common law that would prohibit such corporation, from engaging in such an enterprise, the statute here under consideration would not and could not operate to remove the disability.

"The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental." *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 48, 35 L. ed. 55, 11 Sup. Ct. Rep. 478. See also *City Council of Montgomery v. Montgomery & W. Plank-Road Co.* 31 Ala. 76, and 5 L.R.A. 100.

The railway was chartered by the state of Georgia to "maintain and operate a railroad." Its qualification to do business in Alabama with the secretary of state did not augment its charter powers.

I think it is perfectly clear that the railway is not authorized to engage directly in the motor transportation business on the public highways even though it should seek and obtain a certificate under the Alabama Motor Carrier Act to do so.

Can it organize a subsidiary to engage in such operations? Or, to state the question more in conformity with the facts and circumstances of this case, can the railway abandon existing passenger-train service on its own rails by the inauguration of a substitute motorbus service on the public highways to be carried on by and through a subsidiary corporation?

The majority seem to emphasize the fact that the abandonment which they authorize the railway to make in its passenger-train service does not constitute a complete abandonment of such service on the particular branch in question. The only passenger-carrying train left is a mixed freight and passenger train, and while I do not undertake to express the view that this would constitute a breach of charter obligations, I do know that it has been held by a number of courts that failure to run regular passenger trains by a railroad is a ground for the forfeiture of its charter. Elliott on Railroads (3d Edition), p. 110, § 60, and authorities therein cited. It has also been held that the entering
P.U.R.1928E. 35

into agreements with other corporations to destroy competition is a cause for the forfeiture of a charter. Elliott on Railroads (3d Edition), p. 113, § 60 and authorities therein cited.

But apart from common-law principles, there is a statute of the United States that strikes directly at any attempt by one corporation engaged in interstate commerce to minimize competition through the ownership of stock in other corporations. Section 7 of the Clayton Anti Trust Act (38 Stat. L. 730) forbids the acquirement directly or indirectly by such corporations of the capital stock, in whole or in part, of any other corporations similarly engaged where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly in any line of commerce.

The railway is unquestionably engaged in interstate commerce. I have no doubt that the business which the transport company will carry on will place it in the category of an interstate carrier. Missouri-K.-T. R. Co. v. Northern Oklahoma R. Co. 25 F. (2d) 689.

It is not entirely clear to me from the facts of record that the railway and the transport company have a clear legal right to do the things which the majority have sanctioned, in the manner in which it is proposed to do them.

If such legal right does exist, however, it is, to my mind, purely technical, and arises by reason of an omission by the legislature to declare the rules for carrying out the established policy of the state.

Section 103 of the Constitution of 1901, to my mind, clearly commits the state, in effect, to the rule of fair and free competition in respect to the operations of common carriers. This is not a new or novel proposition. A number of states enforce a similar rule through constitutional interdictions against monopolies. 5 Fletcher's Cyclopedie of Corporations, p. 5430, § 3386. The Government of the United States has long upheld and enforced the same general policy in all matters pertaining to the carrying on of the commerce of the country. In Northern Securities Co. v. United States, 193 U. S. 197, 337, 48 L. ed. P.U.R.1928E.

679, 24 Sup. Ct. Rep. 436, the United States Supreme Court commented upon this policy thusly:

"Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine. Undoubtedly there are those who think that the general business interests and prosperity of the country will be best promoted if the rule of competition is not applied. But there are others who believe that such a rule is more necessary in these days of enormous wealth than it ever was. . . . Congress has in effect recognized the rule of free competition by declaring illegal every combination or conspiracy in restraint of interstate and international commerce. As in the judgment of Congress the public convenience and the general welfare will be best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce, and as Congress has embodied that rule in a statute, that must be, for all, the end of the matter, if this is to remain a government of laws and not of men."

There are three classes of common carriers doing a passenger-transportation business in this state at the present time—boat lines, railroads, and motor busses. The boat lines were the first to come, then the railroads, and finally the motor busses. The business of the boat lines, once important, is gradually diminishing in volume. Motorbus transportation, however, is increasing. The Commission has already issued certificates totaling over six thousand miles of motorbus operations. That represents more mileage than is operated by the railroads in this state. The constitutional interdiction which I have previously referred to includes all common carriers. The policy which it declares applies not only to competition among the carriers in each respective class, but also to competition between the classes themselves, which is perhaps of greater importance. The legislature has specifically provided in § 7028 of the Code of 1923 that railroad companies may acquire and operate boat lines. That legislation expresses the legislature's judgment as to its duty and obligations under § 103 of the Constitution, and it settles the matter so far as competition between railroads and boat lines

P.U.R.1928E.

is concerned. I might add, also, that such legislation seems to augment the charter powers of the railroads with respect to engaging in the operation of boat lines. Here a rule of action for the Commission has been laid down by the body charged with the duty of passing suitable legislation to carry out the declared public policy of the people of the state. The legislature has also acted under the constitutional provision referred to in respect to competition between railroads, by enacting § 9978 of the Code. That section prohibits agreements for the pooling of freight which would have the effect of restraining fair and free competition. But that section applies only to railroads. Motor vehicle transportation was unknown and doubtless unforeseen when that provision was enacted into law.

There is no statute with which I am acquainted that regulates, or seeks to regulate, the matter of competition between railroads and motor carriers. It appears to me to be an omission on the part of the legislature, if indeed the present Alabama Motor Carrier Act can fairly be construed to authorize railroads indirectly to engage in motor transportation on the public highways. In construing that statute, however, I think it would not be unreasonable to indulge the presumption that inasmuch as the legislature must have known that no railroad company, chartered to carry on the business of transportation by railroad, could operate motor vehicles on the highways and failed to authorize them to do so, as was done in the case of the operation of boat lines, it did not intend that such should happen in the comprehensive motor carrier legislation which it passed.

It might be argued, of course, that the motor carrier operations which the majority have authorized in this case being so small there could not be any appreciable restraint of competition. That may be true when the matter is viewed in narrow perspective, although, as the majority point out, an independent operator is already operating over a part of this route and the Transport Company will be in direct competition with him. But having granted the certificate in this instance, I cannot see how the majority can raise the question of public policy in similar petitions in the future. If they continue to act upon such petitions on their merits, I apprehend there will be many more to be
P.U.R.1928E.

passed upon in the future. That means that the existing rail lines will get over into the field of transportation on the public highways, which field is being rapidly occupied by independent operators, and begin taking that over, one at a time. Of course, if a rail line can, through the organization of a subsidiary, which it can control and dominate, establish a new motor bus line on the public highways, it can, with the sanction of the Commission, purchase and take over the routes of independent operators. With the situation as it is, and as I know it to be, I cannot reconcile myself to the view that the entering of the railroads into the field of motor carrier operations on the public highways does not mean a restraint of competition and the creation of a monopoly of transportation. Under the law, the railroads exercise all the dominion over their own rights-of-way that is possessed by an owner in fee simple. They can keep others off their existing highways. If they are turned in upon the public highways of the state, it simply means they will have two highways as against one for the remaining independent motor carrier operators.

It might be said that the Commission is in control of the matter and can, therefore, prevent any undue restraint of competition or the building up of a monopoly of transportation. That might be done, of course, but it is leaving a matter to the judgment of men that the Constitution specifically says should be regulated by law. Furthermore, those familiar with the subject know that the situation presented here can be duplicated many times over the state at the present time. It will be difficult, after the policy is launched of dealing with such petitions upon their merits, to forestall a gradual taking over of a motor carrier operations by the railroads in the future, in my judgment.

The present operating losses of the railway are referred to by the majority. There are other ways and means of reducing these losses without getting over on the highways. There is no certainty that there will not be a loss sustained in the motor bus operations. But even if there be a loss, it does not follow that the railway can escape its obligations to render passenger service which it voluntarily assumed by reason of such loss. Milwaukee Electric R. & Light Co. v. Wisconsin, 252 U. S. 100, 64 L. ed. 476, 40 Sup. Ct. Rep. 306, 10 A.L.R. 892; Fort Smith Light & Traction P.U.R.1928E.

Co. v. Bourland, 267 U. S. 330, 69 L. ed. 631, P.U.R.1925C, 604, 45 Sup. Ct. Rep. 249. A railway may be compelled to continue the service on a branch line although its operation involves a loss. Missouri P. R. Co. v. Kansas ex rel. Taylor, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330; Chesapeake & O. R. Co. v. Public Service Commission, 242 U. S. 603, 61 L. ed. 520, 37 Sup. Ct. Rep. 234. The majority cite the only exception to the general rule in this respect (Mississippi R. Commission v. Mobile & O. R. Co. 244 U. S. 388, 61 L. ed. 1216, P.U.R.1917E, 791, 37 Sup. Ct. Rep. 602), but that case involved an order of a regulatory Commission restoring 6 passenger trains that had already been abandoned. The evidence of public necessity for such action was not at all clear, and the evidence supporting the order was inconclusive. But here, while averring the lack of public necessity for the operation of said passenger trains, the railway and transport company both allege a public necessity for the operation of the motor bus. If there be a public necessity for the operation of the motor bus, then it follows that some such necessity exists for passenger transportation. The difference in form merely represents a difference in the expense between the two modes of performing the service. But the railway is comparing the expense of operating a locomotive passenger train with the expense (that is, the estimated expense) of operating a motor bus. It is possible for the railway to do what other railroads are doing, that is, to operate a modified form of passenger train service on its own rails, such as the gas-electric train. The initial expense of inaugurating such service might conceivably be greater than the initial expense of putting a bus on the public highways, but it is exceedingly doubtful if depreciation would be anything like as heavy. Then, too, the state taxes the gross receipts of a motor bus at a much higher figure than it taxes the gross receipts from railroad passenger transportation. I am sympathetic with the efforts of some of the carriers to modify their service in such way that they can reduce their expenses and offer greater attractions in point of comfort to the travelling public, so long as they stay on their own rails. This has gone beyond the experimental stage; it can be done and is being done by other carriers. Why is that not proposed in P.U.R.1928E.

this case? As a matter of fact, I do not think it is even necessary to secure the permission of the Commission to substitute a modified form of passenger service for a locomotive train so long as an established service is not abandoned.

A motor bus on the public highways is not an absolutely adequate substitute for a passenger train. A passenger train has greater capacity for the transportation of baggage, express, and mail than has a motor bus. Moreover, the public highways usually do not exactly parallel the railway lines, and some stations and flag stops on the railways would have to be abandoned if motor busses are substituted for passenger trains. These objections, however, cannot be offered to the gas-electric train or a self propelled vehicle of a similar kind operated on the rails of the rail carriers.

Under all the circumstances, I think it better for the Commission to refrain from granting this certificate until the legislature, acting in accordance with the constitutional declaration of public policy, has mapped out a course for the Commission to follow. According to my construction of the Alabama Motor Carrier Act, the Commission has the discretion to do that.

Note.—Automobiles.

- I. In general, 551.*
- II. Regulation by the Commission, 552.*
- III. Regulation by municipalities, 552.*
- IV. Insurance, 553.*

I. In general.

The practice of selling membership tickets in "auto travel clubs" constitutes a violation of the law (Public Utilities Act, § 79) where individuals are thereby unlawfully assisted in operating automobiles as common carriers without a certificate to carry on their business. California Transit Co. v. Auto Tours Continental Club (Cal.) Decision No. 19344, Case No. 2425, Feb. 6, 1928.

The consolidation of "on demand" service with scheduled operations will not be permitted until applicant for authority is prepared to establish such service upon a regular business, in which event further authority should be sought from the Commission. Re McConnel (Cal.) Decision No. 19651, Application No. 12258, April 21, 1928.

A licensed motor utility not having sufficient equipment to take P.U.R.1928E.

care of peak demands and purporting to lease the equipment of private individuals operating their own cars in return for a percentage of the revenues taken in, is fully responsible for their conduct, and the payment of all taxes when due, and will be expected to assume and perform the duty of seeing that they do not at any time engage in any transportation business except for the licensed operator, and that the proceeds of such business are delivered to it. *Re Glacier Route (Colo.) Application No. 909, Decision No. 1749, May 10, 1928.*

Notwithstanding there had been evidence of violation of the rules and regulations governing the operation of motor vehicles as common carriers in the past, the New Hampshire Commission decided not to revoke an operator's license, in view of the fact that he had no knowledge of such violations, and did not approve of them, that his service was improving, and that he assured the Commission that busses would be lawfully and carefully operated in the future. *Re Caplan, J-200, June 2, 1927.*

II. Regulation by the Commission.

Rules and regulations affecting transportation of persons and property by motor vehicle common carriers were adopted by the Arizona Corporation Commission. *Re Motor Vehicle Common Carriers, Docket No. 3130-A-1800, Decision No. 4454, May 28, 1928.*

A statute retaining jurisdiction to regulate motor carriers operating under or by color of contract with cities or towns in the local governing bodies thereof, excludes from the jurisdiction of the Commission only carriers operating under color of contract or other operators whose service would compete with such carriers. *Re Smith (Ind.) No. 835-M, April 14, 1928.*

A rule requiring the Commission's consent to the operation of additional motor equipment by a carrier is for the protection of the public. *Re Butte-Virginia City Freight Service (Mont.) Docket No. 37, Report & Order No. 1506, April 16, 1928.*

The Commission has jurisdiction over the rates and service of companies operating busses as long as they are in operation, notwithstanding it has no authority to compel a bus company to continue operation if it desires to go out of business. *Re Wisconsin-Michigan Power Co. (Wis.) R-3508, May 3, 1928.*

III. Regulation by municipalities.

The Indiana Commission found that § 8 of an ordinance adopted by the city of Terre Haute (Feb. 24, 1927) known as General Ordinance No. 5, providing that no bus should be operated so as to stop, receive, or discharge passengers upon public highways, P.U.R.1928E.

within said city, on which was located a street car track was unreasonable and that it was an unlawful interference with a petitioning bus company's service to the public and was, therefore, void. *Gregg v. Terre Haute No. 785-M, June 22, 1928.*

IV. Insurance.

A call-and-demand operator was ordered without penalty to stop regular operations between fixed termini without a regular certificate for such service. The Montana Board of Railroad Commissioners stated: "A call-and-demand license, whether it concerns persons or property, does not contemplate regular scheduled service, nor does the insurance policy placed with the Board to cover risks incident to call-and-demand service insure the risks attendant upon regular stage line service. Naturally, this difference in risk is reflected in the amount of insurance premiums paid making it a matter of economy for a bus operator to have to pay for the lesser risk, but the policy of the statute is to fully protect the public against loss or damage to person or property suffered while being transported by any of the state's licensed carriers, and it is patent that, if a bus operator furnishing regular passenger service has placed with the Board an insurance policy covering livery service only and he meets with an accident whereby a passenger is hurt, the injured party would have no recourse against the insurance company." Re Courville, Dockets Nos. 93, 131, 371, Report & Order No. 1513, May 19, 1928.

INDIANA PUBLIC SERVICE COMMISSION.

RE MARTINSVILLE TELEPHONE COMPANY.

[No. 8556.]

Valuation — Agreement between parties — Rehearing.

A motion for a rehearing of a telephone rate proceeding by a city was granted where the rates had been fixed by an agreed valuation without actual estimate.

[October 6, 1928.]

PETITION by a city for a rehearing of a telephone rate-making proceeding; granted.

Appearances: B. G. Halstead, for petitioner; Ralph K. Lowder, City Attorney, for city of Martinsville.

Harmon, Commissioner: This cause was heard on April 23, 1928, and a new and amended schedule of rates was established P.U.R.1928E.

and made effective as of date of April 26, 1928, in Martinsville, Indiana.

The order issued in said cause was carefully considered by the senior member of this Commission and the order under discussion at this time was carefully prepared by him.

Following the promulgation of said order on June 23, 1928, the city of Martinsville, by its mayor and common council, filed a petition for a rehearing, in which petition were set forth separate reasons why the rehearing should be granted.

The motion for rehearing was set for argument in the city of Martinsville, at the city building, on August 9, 1928. At this time, by agreement of the parties, an amended petition was substituted for the original. This amended petition is in words and figures following, to-wit:

"The city of Martinsville by its mayor and common council acting in its own behalf and in behalf of the citizens of Martinsville, Indiana, hereby petitions the Public Service Commission of the state of Indiana, for a rehearing in the above entitled cause for the following reasons, to-wit:

"(1) That the extra exchange line mileage rate of \$1 per quarter mile or fraction thereof, for all individual or private branch trunk lines per month is unreasonable and excessive.

"(2) That the practice of the Bell Telephone Company of charging the local company 5 per cent over the actual cost of supplies and services is objectionable and without justification.

"(3) That the salary of \$7 per week paid to the 6 student employees is not stationary or permanent and should be adjusted for rate-making purposes.

"(4) That the rate of depreciation amounting to 5 per cent on the depreciable property is excessive and unreasonable.

"(5) In a Commission's order made May 23, 1928, page 9, the first paragraph thereof, the order shows that the value of the property taken for rate-making purposes was the book cost. Section 12680 of Burns Revised Statutes of the state of Indiana, states clearly that the value of the property used and useful, giving weight to the reasonable cost of bringing the property to its then state of efficiency, shall be used in determining the rate base.

P.U.R.1928E.

"The Commission's order of April 23, 1928, in the above entitled cause is illegal, unlawful, and contrary to the laws of the state of Indiana.

"(6) The rate on intercommunicating telephones was raised from \$1 to \$2.25. The Martinsville Telephone Company have practically nothing whatsoever to do with intercommunicating telephones. These telephones are not connected to the outside, and have no connection with the local telephone company. Many of them have been installed for a long period of years, and there has been no additional cost of any kind or character, relative to these kind of telephones. Hence the increase in intercommunicating telephones is unreasonable and unjust.

"(7) The rates for the city of Martinsville in the above entitled cause as established by the Commission's order on April 23, 1928, are excessive and unreasonable.

"(8) Working capital was allowed in the Commission's order of April 23, 1928, in the sum of \$4,290.22, which is in excess of the usual and reasonable allowance for this item. Approximately one month's operating expenses (the usual allowance), exclusive of taxes and depreciation, should be in this case from \$1800 to \$2000. One reason being that the charges are received in advance of the services."

Without discussing the reasons set forth in said amended petition in detail, enough question was raised in the mind of the hearing Commissioner to justify the granting of the petition herein.

Without discussing reasons fully, the hearing Commissioner feels that the rates as fixed in the original hearing were induced very largely by an agreement which had been made between the telephone company and various members of this Commission.

The Commissioner who heard the original case acted entirely on what he believed this agreement to be. He rendered what seemed to be a reasonable decision, but subsequent matters have come up which seem to make it necessary to review this decision.

In a recent case held in the Federal Court for the Southern District of Indiana, in which the Bell Telephone Company was appearing, the Court, in effect, held that rates cannot be fixed by agreement but must be based on a valuation of the property
P.U.R.1928E

of the utility actually used and useful. For the reason that this was not done in the case referred to, a new hearing is ordered.

In the Martinsville case the Commission felt, at the original hearing, and still feels, that if rates could be fixed on actual costs, as was done in the original order, about the best and most equitable method possible would be followed. This was very largely done. The city and the utility agreed on the rate base, determined as before stated on actual costs. No evidence was offered of fair value. Since this was not done, and both the utility and the city participated in an agreement without fixing value, there seems to be no escape from the fact that a new hearing should be granted herein.

Singleton, McCardle, McIntosh, Commissioners, concur.

CONNECTICUT PUBLIC UTILITIES COMMISSION.

CITY OF HARTFORD

v.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY.

[Docket No. 1087.]

Crossings — Elimination — 24-hour protection.

1. Primary reasons for the elimination of grade crossings in populous centers having 24-hour gate protection were held to be because of the delay to highway traffic and the obstruction of city development rather than dangerous character of the crossings, p. 564.

Service — Safety — Railroads.

2. Public safety and adequate service are of primary importance in the rendition of public service and, although as between the two, the former is more important, they must be taken as interconnected elements in determining whether a railroad utility should be directed to use its funds for any particular improvement, p. 564.

Commission — Power over managerial questions — Necessary improvements.

3. A utility may be presumed to know its own needs better than the Commission does and a statement by a railroad company that more necessary improvements must be delayed if a proposed separation of grades is ordered will be accepted as correct in the absence of a contrary showing, p. 564.

P.U.R.1928E.

Crossings — Commission jurisdiction — Apportionment — Statutes.

4. The heavy burden of expense placed upon a railroad company by state statute for the elimination of grade crossing made primarily necessary for the city's development is a matter over which the Commission has no control other than to consider the amount involved in respect to the company's financial condition and the necessity of other necessary improvements, p. 566.

[September 21, 1928.]

MOTION by city to continue proceedings on a petition for the elimination of a grade crossing; case reopened for consideration of elimination plans during the ensuing year.

By the **Commission**: The city of Hartford filed with the Commission on January 13, 1914, a petition alleging that the crossings at grade with the tracks of the New York, New Haven & Hartford Railroad Company at Windsor, Russell, Avon, and Canton streets in Hartford, constituted a dangerous condition and outlined in said petition a plan or scheme for the elimination thereof and prayed that the Commission approve the alterations, changes and improvements set forth in the petition under the statutes made and provided therefor and to make such other orders in the premises as the Commission might determine.

Hearings were had upon the petition in February 1914, to which the city and the railroad company were the chief parties in interest and at which evidence in support of and against the alleged dangerous condition at these crossings was produced and plans of elimination were presented by the city for the consideration of the railroad company and the Commission. The Commission found at that time from the evidence then presented, that said crossings were dangerous and that public safety required their elimination. As this finding was made more than fourteen years ago it should now and in future hearings be subject to review and modification if changed conditions warrant. Further proceedings on the petition as well as upon petitions of the city for elimination of other grade crossings in Hartford pending at that time were postponed indefinitely by an order of the Commission under date of April 29, 1914, upon application of the railroad company and hearing thereon with the city present, wherein it appeared that the financial condition of the company
P.U.R.1928E.

did not warrant further procedure by the parties under the pending petition. The city consented to the indefinite continuance and the Commission made its order of indefinite continuance based upon the agreement of the parties in interest and provided in the order that if the company's financial condition should at any time appear to either the city, the railroad company, or the Commission to justify further procedure in the premises the matter would be assigned for a hearing by the Commission upon request of either the railroad company, the city of Hartford, or upon motion of the Commission.

On January 19, 1928, the city of Hartford filed with the Commission a motion to reopen the hearing upon the elimination of the aforesaid crossings pursuant to the terms of the indefinite postponement. Said motion to reopen was heard by the Commission, after notice to the railroad company, in Hartford, on Tuesday, May 15, 1928.

At the hearing on the motion the railroad company claimed its present financial condition would not warrant the expense that would be placed upon it by the elimination of the crossings and asked for a postponement of the hearing for three months in order to present a complete statement of its present financial condition, stating that the importance of the matter required a careful study by one of its vice presidents, and required the preparation of extensive and detailed data. The claims appearing reasonable, the Commission granted the request for adjournment and continued the hearing to July 9, 1928, at which time the parties again appeared and were at issue on the question of the financial ability of the railroad company to carry out the elimination of these crossings.

The railroad company presented through its vice president, C. E. Smith, a comprehensive review of the company's financial condition since 1914, its financial obligations at the present time and in the immediate future with respect to necessary improvements of its properties, its present, past and prospective earnings and expenses of operation and its attitude with regard to the elimination of these particular crossings. The salient claims as culled from this statement are as follows:

1. Since 1913 the company has not earned a reasonable re-P.U.R.1928E.

turn on the fair value of its property devoted to the public service.

2. Operation of the company during the period 1919 to 1923, inclusive, not only failed to produce a net income, but resulted in a total deficit of about \$27,200,000 for the period and while the company has earned a net income commencing 1924, the total net income since then has about equalled the accumulated deficit for the period of 1919-1923.

3. The operating revenues of the company from both freight and passenger service are decreasing and an increase in net income can only be effected by reducing operating expenses, which calls for the reinvestment of net income in the form of improvements to the property, so as to make it possible to carry more freight and passengers at less cost.

4. In carrying out this policy, the company has expended between 1912 and 1927, \$40,000,000 for new equipment, \$15,000,000 for improvement of freight yards, \$5,000,000 for replacement of track structure, \$2,000,000 for improved shop machinery and \$12,000,000 for miscellaneous improvements. Important additional improvements to be made in the future are increasing the trackage between New Haven and Providence, Rhode Island, and double tracking the single line between New London and Worcester, in order to adequately accommodate traffic, the cost of both improvements being estimated to run into millions.

5. During the last decade, the company has expended in the improvement of its properties in Hartford and East Hartford, \$3,500,000.

6. The company's policy has always been the elimination of grade crossings at such times as the company could financially afford it, which policy has resulted in one-half of the highway crossings in Connecticut being separated crossings.

7. The company desires to be relieved of the burden of excessive grade crossing eliminations while it is re-establishing itself in a sound financial position, in order that it may devote as much of its funds as possible in the improvement of its physical property and in furnishing New England industries with a quality of service that will enable them to compete successfully
P.U.R.1928E.

with industries in other parts of the country. During the interim, public safety can be preserved by the maintenance of grade crossing watchmen, gates, visible and audible signals and modern highway signs, near the crossings. During recent years, the company has been developing and installing many of the last two protective devices.

8. The traveling public should assume a much larger share of the cost of grade crossing elimination than in the past because train movements have been decreasing and railroad crossings have been protected at a great cost to the company, while highway traffic has increased tremendously and the accidents occurring at the crossings are chiefly due to the carelessness of users of the highway.

9. The company is faced with large expenditures for grade crossing eliminations in other states wherein it operates, particularly in Massachusetts, and many projects have been ordered by those states in past years, but held in abeyance on account of the company's financial condition.

10. The company has been ordered by the Interstate Commerce Commission to equip with automatic train control its tracks between New Haven and Springfield, between New Haven and Auburn, Rhode Island, and between New Haven and New York, the cost of which will amount to several million dollars. The company was excused temporarily by the Commission from the installation of that device on its tracks between New Haven and New York, on account of the financial condition of the company.

11. The company has agreed to expend in Connecticut on grade crossing eliminations \$600,000 during the years 1927 and 1928 in co-operation with the State Highway Department in the improvement of trunk line and state aid roads and the elimination of dangerous conditions at crossings thereon.

12. The company is expending about \$1,000,000 annually in grade crossing eliminations throughout its system as a result of which a number of grade crossings will be eliminated each year and the company should continue this work. An additional million dollars to eliminate the four crossings in question would
P.U.R.1928E.

require the curtailment of other necessary improvements to the company's property.

13. The estimated cost of eliminating these four crossings would be at least \$1,500,000 and might be \$2,000,000.

14. Based upon a traffic count covering the hours of 6 A. M. to 10 P. M. on July 2 and 3, 1928, taken at the four crossings in question and also at the intersection of Main and Pearl streets and Main and Morgan streets in Hartford, the delay to traffic at all the four crossings is considerably less than the delay at the two street intersections.

15. From the records of the company, no accidents have occurred at Russell street in about twelve years; there has been only one fatality at Avon street crossing during that period, minor injuries to four trespassers and eight injuries to automobiles by failure to stop upon signal; there has been no fatality at Canton street crossing during the same period and about twenty automobiles have been damaged by running into the crossing gates when down; at Windsor street crossing two trespassers have been killed during the 12-year period, two more trespassers have been injured and about sixteen automobiles have been damaged by running into the crossing gates when down.

16. A minimum period of from five to ten years will be required before the company will have made sufficient financial progress to warrant undertaking the elimination of the crossings.

Claims of the City.

The claims of the city with respect to the elimination of these crossings may be summarized as follows:

1. The crossings can be eliminated at a cost less than \$1,500,000, the minimum estimate of the railroad company. However, no approximate amount of the cost was given by the city as its estimate.

2. While the crossings may not be unusually dangerous in comparison with other crossings located in populous centers, the existence of the crossings unreasonably delays traffic over the streets involved, and Windsor street particularly. As examples of such delay the city stated that a delay to traffic on one occasion when the gates were down at the Windsor street crossing lasted

nine minutes, and that during a period of one hour's observation a total delay of twenty-seven minutes to traffic occurred at the crossing.

3. The elimination of the crossings is desirable not only to avoid delay to all kinds of highway traffic, including the city's fire apparatus, but is also desirable in order to remove a hindrance to the development of the city since the crossings obstruct a direct and natural outlet from Main street to points north of Hartford; which additional outlet is necessary in order to relieve the present and increasing congestion on Main street now serving as a traffic route out of Hartford for points north.

4. The elimination of these crossings would constitute for the railroad company reasonable excuse for postponing other eliminations in other states where such projects are now in abeyance on account of the company's financial condition, and the cost could be financed by postponing some particular improvement to the company's property in contemplation as stated above.

With respect to the first claim of the city, it appears that the cost of eliminating the crossings under the city's original plan was estimated in 1914 at about \$535,000. The railroad company stated at the present hearing that such plan is unfeasible because it provides for a 13 foot elevation in the track structure which would not be satisfactory from an operating standpoint. Whatever plan might be satisfactory to both parties and approved by the Commission, it is a well known fact that the prices of construction, labor and materials have increased tremendously since 1914, adding greatly to the cost of elimination on any plan. With respect to unusual delays at the crossings as set forth in the second claim of the city, the railroad company conceded them as unreasonable and as extraordinary, and promised a correction. With respect to the fourth claim of the city, the railroad company claimed that other states demand equal preference in the matter of priority of elimination and that the company knows of no planned improvement which could be delayed and the cost thereof devoted to the elimination of these particular crossings. The company conceded, however, that should the Commission order the elimination, it would have to raise the P.U.R.1928E.

money by postponing some contemplated and necessary improvement.

The statute under which the original petition was brought is § 3710 of the General Statutes (Revision of 1918), which has remained substantially the same since the original enactment in 1889. With regard to the apportionment of the cost of elimination, the statute provides that not more than one-fourth of the cost shall be apportioned against the city where the highway was laid out prior to the construction of the railroad intersecting it, and not more than one-half shall be apportioned to the city where the highway was laid out subsequent to the construction of the railroad intersecting the highway. No evidence was introduced at any of the hearings as to whether Windsor street was laid out prior or subsequent to the railroad tracks intersecting it, although the city claimed, and the railroad company denied, that Windsor street was laid out before the railroad was constructed. No claims in that respect were made by either party relative to Avon, Russell, and Canton streets. Assuming all of the highways in question to have been laid out prior to the construction of the railroad, the maximum apportionment to the city under the present statute upon the minimum estimate of cost made by the railroad company, \$1,500,000, would be one-fourth, or \$375,000, and the balance to be borne by the railroad company would be three-fourths, or \$1,125,000. If, in fact, Windsor street was laid out subsequent to the construction of the railroad, the maximum apportionment to the city would be greater, but it would not necessarily be 50 per cent of the total cost since conceivably Canton, Russell, and Avon streets, one or more of them, may have been laid out prior to the construction of the railroad, in which event less than 50 per cent of the cost might equitably be apportioned to the city. It seems probable that the apportionment to the railroad under any circumstances would approximate \$1,000,000 under the present provisions of the statute.

The question then is whether the financial condition of the railroad company upon the evidence submitted warrants the re-opening of the case at this time and placing upon the company P.U.R.1928E.

an expense of probably \$1,000,000 in the elimination of these crossings.

[1] Whenever crossings having 24-hour gate protection in populous centers are proposed to be eliminated the primary reason is because the crossings delay highway traffic and obstruct the natural development of the city concerned and not so much because the crossings are unusually dangerous. Obviously the cost of eliminating many such crossings would run into millions of dollars and constitute a burden that could probably never be borne in large part by the railroad company, and could only be borne by a distribution of the larger part of the cost upon the state or city, or both. The evidence submitted by the railroad company with regard to public safety at the four crossings and the greatly disproportionate increase of highway traffic to railroad traffic in recent years and claims 2 and 3 advanced by the city for the elimination of the crossings, bear out this general statement. Accident records compiled by the Commission since 1911 (substantially the same as the record submitted by the railroad company) do not establish the crossings as unusually dangerous. Protection twenty-four hours in the day by gates or watchmen at the crossings should safeguard all but careless and reckless individuals.

[2, 3] Inasmuch as the crossings are not unusually dangerous due to 24-hour protection, public safety as a reason for the elimination of the crossings, becomes of secondary importance compared with the reasons advanced by the city for elimination and stated above. The question at issue, therefore, narrows down to a determination of whether the railroad company should eliminate these crossings in preference to one or more of a series of necessary improvements to its property that would improve its general railroad service. Public safety and adequate service are of primary importance in the rendition of public service and, of course, as between the two, the former is more important, although they are more-or-less interconnected since adequate service connotes safety of operation. In this respect the numerous improvements planned by the company relate in large part to increasing the factor of public safety. The evidence clearly shows that the elimination of these crossings at this time cannot

be carried out without foregoing some necessary improvement. With respect to such improvements, affecting the company's general railroad service, the company may be presumed to know its own needs better than the Commission does, and its statement, in the absence of a contrary showing should be accepted as reasonably correct.

The four crossings are in close proximity to each other in a more or less congested portion of the city, and the elimination of any one would naturally involve the other crossings.

The Commission is personally familiar with these crossings and with the volume of railroad and highway traffic passing over the same, and recognizes the desirability of their elimination as grade crossings, both in the interest of safety and civic improvement.

Avon street crossing, on account of the steep grade from the west and the number of tracks in the highway, presents the physical appearance of being the most dangerous and the most difficult to safeguard as a grade crossing.

The inclusion of the four crossings in one general scheme of elimination involves a large amount of engineering study and surveys to prepare proper economic plans and estimates for their elimination which will best accommodate highway travel and provide for the city's development, and at the same time least interfere with the proper operation and maintenance of the railroad company's plant used for public transportation. To make such surveys and prepare such plans will necessarily take considerable time, as the importance of the undertaking and the amount of money involved make it extremely advisable to adopt the best possible plans under all the circumstances. The city prepared plans in 1914, as detailed in its petition, which met with serious opposition at that time from the railroad company on account of the physical difficulties created for proper railroad operation. The railroad company has submitted no plans.

Assuming the reasonable necessity for the elimination of these crossings and the considerable time required in preparing proper plans which would have to be approved by the Commission, it would seem desirable that if financial arrangements could be made between the company and the city, or when the company's

P.U.R.1928E.

financial condition warrants the expenditure necessary for the elimination of these crossings, the work should be promptly undertaken without having to endure the long delay necessary to prepare plans.

[4] The heavy burden of expense placed on the railroad company by the statute in the elimination of city street crossings, made primarily necessary for the city's development, is a matter over which this Commission has no control, other than to take it into consideration, together with consideration of the total amount involved in determining whether the financial condition of the company and its general financial obligations in other grade crossing eliminations, warrant the expenditure at the time.

We do not believe that an order of elimination should issue at this time, but we do believe that consideration should be given to the preparation of plans during the ensuing year.

Wherefore, the case is reopened for the sole purpose at this time, of considering elimination plans and estimates and such matters and motions as may be incident thereto.

We hereby determine and direct that notice of the foregoing be given to the interested parties by Henry F. Billings, Secretary of the Commission, by forwarding by registered mail, true and attested copies thereof, addressed one to the mayor and board of aldermen of the city of Hartford, Hartford, Connecticut, and one to Arthur E. Clark, secretary, the New York, New Haven & Hartford Railroad Company, New Haven, Connecticut, on or before the 29th day of September 1928, and due return make hereon.

Note.—Crossings.

- I. Regulation by the Commission or state, 566.**
- II. Regulation by local authorities, 568.**
- III. Grade separation and crossing elimination:**
 - a. Apportionment of expense, 569.**
 - b. Degree of danger, 571.**
 - c. Other considerations in crossing elimination, 572.**
- IV. Establishment of grade crossings, 574.**
- V. Protection of existing crossings, 576.**

I. Regulation by the Commission or state.

The Commission has no jurisdiction to order a grade crossing to P.U.R.1928E.

be eliminated except by causing the grade of the highway and the railroad to be separated, and a petition asking only that a crossing be vacated and abandoned cannot be entertained notwithstanding a contemplated consolidation of crossings at another point. *Board of County Comrs. of Clark County v. Baltimore & O. R. Co.* (Ind.) No. 9007, Dec. 16, 1927.

The fact that a grade crossing is of a hazardous character and requires protection should never be determined by a requirement that a sufficient number of accidents must first occur or human lives be lost, where the Commission is given by law (§ 10459, Revised Statutes of Missouri 1919) exclusive power over the protection of grade crossings. *State Highway Commission v. Wabash R. Co.* (Mo.) Case No. 5466, Dec. 6, 1927.

The petition of a township committee, in *Re Gloucester Township*, April 10, 1928, for the establishment of a crossing that would involve the closing of a private crossing, was refused, where no testimony was offered from which it could be inferred that the public had rights in the private crossing, because of the fact that the closing of a private crossing does not come within the scope of the statute defining the powers of the Board. The New Jersey Board of Public Utility Commissioners stated: "Section 21 of the Act Creating the Board of Public Utility Commissioners defining the authority of the Board in the matter of grade crossings presupposes the existence of a highway over the right of way of the railroad."

The Commission has power to order the construction of an underpass, where a state highway crosses a railroad at an acute angle, without permitting the construction of a 6 degree curve in the highway to allow the road to pass under the tracks more nearly at right angles, in view of the added danger of a curve between the walls of a cut. *Lehigh Valley R. Co. v. Public Utility Comrs.* — N. J. L. —, 137 Atl. 442, May 17, 1927.

The Commission may order the closing of a grade crossing near an underpass at the crossing of a state highway and the diversion of traffic to the highway. *Ibid.*

The Commission may reasonably require an underpass 66 feet wide, with space for sidewalks, where this is the settled future width of the road. *Ibid.*

A railroad, in accepting a franchise from the state giving it the right to operate over its highways, has agreed to submit to the regulations and burdens imposed by the state in so far as they relate to the safety of the public where its tracks cross the highways at grade. *Re Baltimore & O. R. Co.* (Ohio) Cause No. 5005, May 15, 1928.

P.U.R.1928E.

Under the provisions of the Public Service Company Law giving a Commission power to apportion the expense of crossings, the Commission can allocate the cost of effectuating a crossing plan to make adequate and safe an old highway bridge over railroad tracks, unrestricted by fixed standards in effect prior to the Public Service Company Law, whether such standards be general as in the statute (Act of June 7, 1901, P. L. 531) providing for equal participation between the railroad company and the municipality, or specific as in the case of contract ordinances, or court decrees. *Sharpsville v. Pennsylvania Co. (Pa.)* Complaint Docket No. 5009, March 9, 1926.

Under the provisions of the Public Service Company Law giving the Commission power to apportion the expense of crossings, a municipality can be required to bear a part of the expense of reconstructing an old highway bridge over railroad tracks. *Ibid.*

In Re Legislative Joint Resolution No. 59, R-3447, Feb. 13, 1928, the legislature of the state of Wisconsin enacted a resolution directing the State Commission to cause the removal of the center abutment under a railroad viaduct on a certain highway that had resulted in a highly dangerous traffic condition. An objection was offered on behalf of the railroad company to the jurisdiction of the Commission to proceed in the hearing on the ground that the joint resolution was without force and effect. The Commission found that it had no option under the mandate of the resolution but to order the removal of the center pier and the expense of the change was accordingly apportioned between the railroad, the county and the village.

II. Regulation by local authorities.

A notice and hearing by a city board in 1927 as to the necessity of the laying out of certain streets which had already been laid out in 1911 without notice or hearing to the railroad which they crossed, was held not to be a compliance with the statutory (Railroad Law, § 90) requirement providing for prompt notice by the local authorities of its intention to lay out and the granting of opportunity to the railroads to be heard, and the Commission was consequently without jurisdiction to entertain the application for apportionment. *Re New York (N. Y.) Case No. 2865, Feb. 28, 1928.*

The Commission cannot make a determination as to the method by which a new street or a new portion of a street shall cross a steam surface railroad until local authorities have determined that such street is necessary and a hearing has been afforded after due notice to the railroad company in compliance with the Railroad Law (§ 90). *Ibid.*
P.U.R.1928E.

III. Grade separation and crossing elimination.**a. Apportionment of expense.**

Where it was not essentially the relief from the hazard of crossing railroad tracks at grade which necessitated the construction of a pedestrian subway, but the fact that owing to the creation of an artificial barrier by a railroad for its sole benefit, the pedestrian traffic in order to accomplish a crossing, must either use the hazardous vehicular roadways of the present subway or climb over the barrier, the cost of constructing the pedestrian highway was assessed 25 per cent to a city and 75 per cent to the carrier. *Re Marysville (Cal.) Decision No. 19113, Application No. 14132, Dec. 10, 1927.*

In *Re San Luis Obispo, Decision No. 19060, Application No. 14178, Nov. 30, 1927*, the California Commission, in granting authority to a county to construct an overhead crossing, inserted the condition that no portion of the cost assessed to the county for the construction or maintenance thereof should be assessed by the county, in any manner whatsoever, to the operative property of the carrier involved.

The contention was made by the Connecticut Highway Commissioner that an apportionment of expense between the parties interested in the elimination of a grade crossing should be upon the percentage basis rather than a flat sum because of previous experience in the elimination of dangerous conditions where the actual cost exceeded considerably the cost estimated by a railroad company. The Connecticut Commission thought, however, that a fixed amount should be assessed where the approved plan involved considerable highway work not directly connected with the grade elimination. The Commission stated: "Where it is possible to determine the approximate cost of 'the removal, change or relocation of such crossing, highway, road, tracks, pipes, wires, poles, or other fixtures or tree or building or other structure, as may be necessary to eliminate such dangerous conditions,' it would seem unwise to adopt percentages on a considerable amount of work not necessarily connected with the elimination." *Re New York, N. H. & H. R. Co. Docket No. 5070, July 16, 1928.*

The Connecticut Commission commenting upon the relative proportion of expense to be borne by parties in the elimination of grade crossings stated: "Where a strictly utilitarian plan is considered for apportionment purposes as in this case, an amount approximately one-half the cost of such plan may reasonably represent what the railroad company should pay as its portion on the approved plan, taking into consideration all the facts presented." *Ibid.*

No portion of the expense incident to the elimination of a grade
P.U.R.1928E.

crossing can be apportioned to the Federal Government, where a law of the state places all Federal Aid funds into the state "Road Fund" before disbursement, thereby eliminating the Federal Government as a direct party to any such proceedings. Department of Public Works and Buildings, Division of Highways v. Chicago, R. I. & P. R. Co. (Ill.) No. 15278, Nov. 23, 1927.

In Re Board of Estimate and Apportionment, Case No. 2666, March 21, 1928, the New York Transit Commission held that an 18-foot clearance was a reasonable one for the New York Central Railroad and that the cost of eliminating the crossing with such a clearance should be apportioned, notwithstanding an objection by the city of New York that a 16½-foot clearance was customary and sufficient, and that the cost of any additional clearance should be borne by the railroad alone. Chairman Gilchrist said: "The principle which has customarily actuated the Commission in allowing the inclusion of amounts in joint grade crossing accounts has been that the railroad company is entitled to reasonable replacements of all its facilities enjoyed prior to the elimination work and which have been disturbed or destroyed by the new construction. It follows that this replacement should be a charge against the joint account, or otherwise the railroad company would be compelled to bear more than its statutory one-half of the cost. Similarly, any new or expanded facilities constructed in conjunction with the elimination are considered as additions and betterments to the railroad and excluded from the joint account. Otherwise the railroad company would be benefited by state or municipal aid for improvements not properly falling within the strict sense of the grade crossing elimination and for which the state has never assumed any of the liability. . . . Prior to the construction of the highway bridge there was no obstruction at this point limiting the height at which freight loads could be brought in. The 18-foot clearance is expected to furnish a clearance which will reasonably permit the continuance of the former facilities enjoyed by the railroad company. It will not increase them in any way. If the railroad should be required to pay for this additional clearance, it would be bearing a larger proportion of the cost than the statute requires and I recommend that the Commission approve the accounting filed by the railroad company and apportion the cost accordingly."

In the absence of statute the Oklahoma Corporation Commission adopts the following theory in apportioning the expense of a grade separation between the railroad and the highway authorities: "The Commission is of the opinion that the overhead crossing should be located on the alternate route, and at the point indicated in plaintiff's exhibit herein, and that the cost of constructing the same should be prorated on a fifty-fifty basis between complainant and P.U.R.1928E.

defendant, after deducting from said cost the amount which would be required to build the highway on the section line across said right of way if the railroad right of way was not there. This is on the theory that if no railroad is there the State Highway Commission would have to expend that amount of money in the construction of said road, and that the railroad company should not be forced to pay any part of such sum, but should pay one half of the excess amount expended in building grade separation from break of grade to break of grade." County Commissioners v. MKT R. Co. Cause No. 8483, Order No. 4427, Sept. 4, 1928.

b. Degree of danger.

The New Mexico Commission has intimated that serious consideration should be given to foot passengers in the construction of viaducts over grade separation, stating: "The Commission advises that the approaches to the said foot viaduct across the tracks should be so altered and lengthened as to make said approaches accessible to all foot passengers who desire to use said bridge, as the Commission finds that the viaduct in its present condition is not safe for pedestrians desiring to use the same on account of said steep approaches and long, arduous stairways." Re Atchison, T. & S. F. R. Co. Docket No. 43, Sept. 1, 1928. .

The legislature in providing for an appeal to the Commission on the question of the separation of grades did so with a view not only to avoiding highway and railroad accidents but also to prevent the placing of undue burdens on common carriers and the public. Re Baltimore & O. R. Co. (Ohio) Cause No. 5005, May 15, 1928.

The interest and safety of the citizens of a state are of paramount interest in the consideration of what an ordinary, prudent, and reasonable driver would do where the statute controlling the protection and elimination of grade crossings arises from that section of the General Code protecting, by police regulations, the traveling public. *Ibid.*

The rules of negligence, which are applied by a court in personal injury and damage cases such as whether drivers stop, look, and listen at a particular grade crossing, cannot be considered as governing factors in determining the advisability of a grade separation where the empowering statute is primarily for the protection of the traveling public and the cost is shared by the railroad and the public. *Ibid.*

Necessity and expediency are used as a rule of measure of the hazard which grade crossings present, regardless of negligence, recklessness, prudence, or care and the ensuing financial burden to the utility, having due regard for the service which must be rendered and its cost. *Ibid.*

P.U.R.1928E.

A separation of grades will be ordered wherever a crossing is found to be hazardous enough to warrant such an order, even though other crossings within the state are equally dangerous or even more so. *Ibid.*

e. Other considerations in crossing elimination.

It was considered fair and reasonable that a railroad company should assume 60 per cent of the actual expense of an overcrossing project where it was benefited to the extent of being relieved from crossings, watchmen's wages, accident suits, and the extraordinary care of train movements through territory served by nearby crossings, the bulk of traffic from which will be deflected to the main road structures; as well as the indirect advantages of free clearance, creek channelling and purchase of new right of way for roads by the highway department to avoid a number of crossings with the carrier's tracks. Department of Public Works and Buildings, Division of Highways v. Chicago, R. I. & P. R. Co. (Ill.) No. 15278, Nov. 23, 1927.

An alleged oral agreement of seventeen years standing between a railroad and a property owner having land on both sides of the tracks, that a bridge be kept open for passage purposes, was not accepted by the Commission on application to substitute a culvert for the bridge, where it was denied by the carrier and supported only by other personal testimony. Illinois C. R. Co. v. Meyer (Iowa) Docket A-4238, April 18, 1928.

A proposal to substitute for a railroad bridge needing replacement, a concrete culvert 60 by 65 inches, was modified by an order to use a concrete box 6 feet by 6 feet in view of the difficulty which horses and other live stock of an owner having land on either side of the track might have in passing through the proposed culvert. *Ibid.*

In ordering a separation of grades, the Missouri Commission disapproved of a proposed plan on the ground that it lacked economical design and that some of the costs were excessive. The Commission stated: "The Commission is of the opinion and it suggests, in the interest of economy and good practice, that said viaduct and approaches be designed with a 20-foot roadway and economical arrangement of sidewalks; that the roadways be flared as much as possible at the intersection with streets; that the viaduct piers and abutments be designed for the present needs of the railroad company and the central span of said viaduct be reduced to the minimum required by this Commission for safe horizontal clearance." Jackson County v. Missouri P. R. Co. Case No. 5529, June 7, 1928.

In ordering a separation of grades at a crossing the Missouri Commission commented upon the amount of grade to be permitted as P.U.R.1928E.

follows: "Heavy grades are not desirable on trafficways and especially on viaducts and are held as low as possible by all good designers. The highway department of this state in its program of road building considers a grade of 6 per cent the maximum for safety. The Commission believes that in this case a grade of 7 per cent should not be exceeded." *Ibid.*

Consideration of light and sun to adjoining property through the elimination of grade crossing was indicated in the opinion of Chairman Gilchrist of the New York Transit Commission by the following statements: "Before coming to a decision I made a thorough personal inspection of the section and attempted to picture the railroad on the embankment as planned and the effect of such an elevation upon the neighborhood. The railroad runs in a general east and west direction. My inspection was made in the middle of the afternoon and the rays of the sun were paralleling the tracks. Obviously an embankment would not affect the light for the people dwelling on the south side of the railroad. My observations indicated that early in the morning the land to the north of the tracks might be somewhat affected. It happens, however, that for a considerable distance the north side of the tracks is lined by coal yards and other industrial enterprises to which direct sunlight is not an essential. Some of the dwellings on the north side are on slight embankments which would overcome any possible handicap to them."

Re Long Island R. Co. Case No. 2899, April 10, 1928.

A petition of a township asking the elimination of a grade crossing involving the purchase by a railroad of right of way for a road parallel to its track to connect the road, thus cut off, with another grade crossing further on, was refused, and the carrier was requested to purchase right of way parallel to its track for a short distance in another direction to connect the roadway with an overhead structure recently erected, establishing another grade crossing in the immediate vicinity thereof to take care of rural traffic too wide to use the overpass. *Township Board of Clermont Township v. Chicago, M. & St. P. R. Co. (N. D.) Case No. 2841, Nov. 19, 1927.*

A railroad should be required to furnish a private grade crossing of sufficient width over which an occasional piece of wide machinery, such as binders, headers, and harvesters can be handled, such crossing to be fenced and supplied with gates and located in the vicinity of overhead structure too narrow to handle such traffic. *Ibid.*

The supreme court of Pennsylvania has held that a county is liable for damages resulting to a private property owner from a separation of grades by means of a traffic bridge and more particularly by the approaches thereto, since the approaches are part of the bridge and in apportioning the cost and assessing damages the entire project must be considered. *Westmoreland Chemical & P.U.R. 1928E.*

Color Co. v. Public Service Commission, — Pa. —, 142 Atl. 867, May 7, 1928.

It was held by the supreme court of Pennsylvania that neither the state, the county, nor the Public Service Commission would ordinarily be liable for consequential or other damages in the absence of legislation so providing, resulting from a separation of grades to eliminate a grade crossing. *Ibid.*

In determining the damages accruing to property owners by reason of a separation of grade on a Pennsylvania highway, there were several contentions of merchants that their property was damaged by reason of loss of business and the impairment of livelihood, notwithstanding the admission that no actual damages had been sustained as a matter of fact, and that the property would bring in the market as much money after as before the grade crossing was closed. The Pennsylvania Commission stated, in answer to one claim: "Obviously market value cannot rest upon loss of business. The claimant in assuming a diminution of the value of his property because of a diminution in his gross sales or in employing the per cent that his sales had fallen off, as the rod to measure shrinkage in market value of his realty, proceeded on an unsound basis and one not countenanced by law." A similar disposition was made of other such claims. *Re Wood*, Application Docket Nos. 17650-17659, 17838, 17866, 17918, June 12, 1928.

IV. Establishment of grade crossings.

An application for the establishment of a grade crossing was refused by the California Commission, in *Re Berkeley*, Decision No. 19606, Application No. 14190, April 13, 1928, where the most feasible solution of the traffic problem was the opening of a connecting street diverting traffic to an existing crossing where the opening of an additional grade crossing was not justified by public convenience and necessity.

When a proposed crossing is two blocks from an existing crossing an alternate route is available to detour traffic during a few days of the year of a county fair, the crossing would be comparatively hazardous, expensive to construct, and serve a useful purpose for only a few days during each year,—authorization to construct will be denied. *Re Board of Supervisors of Kern County (Cal.)* Decision No. 19179, Application No. 14045, Dec. 23, 1927.

A temporary grade crossing of a railroad by a potentially important highway will not be authorized where the evidence shows that when such highway is opened across the railroad the grades should be separated. *Re Burbank (Cal.)* Decision No. 19106, Application No. 13920, Dec. 8, 1927.

While in general the Commission is of the opinion that where P.U.R.1928E.

private owners subdivide land holdings which require additional private crossings under § 485a of the California Code, an attempt should be made to consolidate the use of such crossings between two owners where reasonably possible. *Re Condos*, Decision No. 19387, Application No. 14257, Feb. 20, 1928.

In apportioning the expense of construction of grade crossings, where it is shown that existing facilities of the carriers involved are ample for years to come, the costs of installing additional facilities for distant future use should be paid for by the owning company desiring such facilities. *Re Los Angeles (Cal.)* Decision No. 19049, Application No. 13737, Nov. 19, 1927.

Where carriers objected to the opening of a proposed crossing by a city, upon the ground that flood waters which would be diverted and carried by the improvement contemplated might damage certain railroad fills some distance from the crossing, the California Commission authorized the proposal of the city subject to conditions properly protecting the carriers in that respect. *In Re Pomona*, Decision No. 19576, Application No. 14107, April 9, 1928.

Authorization was granted to a county to construct a grade crossing on condition that no portion of the cost assessed to the county for the construction or maintenance thereof should be assessed by the county, in any manner whatsoever, to the operative property of the railroad involved. *Re San Bernardino (Cal.)* Decision No. 19076, Application No. 14157, Dec. 2, 1927.

The California Commission has held that while it is customary, before acting upon applications to construct tracks across city streets or roads, to require a franchise from the political subdivision having jurisdiction, this requirement being merely as evidence of consent of the local governing body to the proposed construction, evidence of such consent having been introduced otherwise, for the purposes of the Commission, a franchise from the city is not necessary. *Re Southern P. Co.* Decision No. 19543, Application No. 14200, April 2, 1928.

The Colorado Commission refused permission to establish a grade crossing over railroad tracks approximately 1800 feet from another existing crossing in view of the fact that two crossings in such close proximity was a distinct hazard, since enginemen would not be able to give close attention to two crossings. It was shown that the cost of maintenance of the additional crossing was not warranted by any possible slight convenience that might be provided for a few people. The Commission further stated: "After a careful consideration of all the evidence the Commission finds that every grade crossing installed is an additional hazard to the safety of the traveling public, regardless of the diversion of part of the traffic from another crossing, because of all the elements that may contribute to an accident P.U.R.1928E.

at a grade crossing." Re Board of County Comrs. Application No. 914, Decision No. 1813, June 9, 1928.

The adoption of a new city map (1911) shifting the position of certain streets from twenty to twenty-five feet respectively from that on a former map (1901) was held to be a laying out of either new streets or new portions of streets and in either case sufficient to raise the question whether sufficient notice was given to the railroad companies in compliance with the Railroad Law (§ 90). Re New York, Case No. 2865, Feb. 28, 1928.

V. Protection of existing crossings.

The Connecticut Public Utilities Commission, in commenting upon the degree of danger necessary to require separation of grades, stated: "The elimination of danger at all railroad-highway grade crossings by the separation of grades is not physically or financially possible except by a slow and gradual process. The reduction of danger at such grade crossings by the installation of modern protective devices, such as flash light signals either automatically or manually controlled, is more immediate and expeditious during the necessarily slow process of elimination." Re State Highway Comr. Docket No. 5042, May 17, 1928.

Permission to install swinging gates at crossings of main tracks in order partially to eliminate the stopping of trains has been denied by the Minnesota Commission, in Re Chicago, St. P. M. & O. R. Co. A-4104, A-4105, Feb. 8, 1928. The Commission said that while it is true that an accident may occur at railroad junctions or crossings with any form of protection, through occasional failure of the apparatus or more often through so-called man failure, it is imperative that every precaution for safety be exercised. The statute requires the installation of an interlocking plant or other device approved by the Commission before the full stop is waived; and after fully considering the petition and the evidence in support thereof, it was found that the swinging gate system and the partial stop plan as proposed by the railroads would not provide sufficiently adequate safety to warrant approval.

A red prism light, together with distinctive signs warning the highway traveler that he is approaching a railroad and that the highway might be blocked, placed along the highway at suitable places on each side of a proposed crossing was thought to be adequate protection, where the estimated density of traffic was 400 vehicles per 24 hours, and where, owing to curves in the highway in approaches on either side of the crossing, automobiles would not throw their lights on a train blocking the highway. State Highway Commission v. Wabash R. Co. (Mo.) Case No. 5466, Dec. 6, 1927.

A petition by a railroad, in Re Boston & M. R. Co. D-1085, April P.U.R. 1928E.

20, 1927, to abolish protection at a crossing over which there were thirty train movements daily, and the highway travel, including unattended children under nine years of age is considerable, was denied. The New Hampshire Commission stated that a less expensive form of crossing protection is often permitted, but only in rare cases should crossing protection be abandoned, as modern highway travel calls for an increase rather than a decrease in railroad crossing protection.

In Collette v. Boston & M. R. Co. No. 2129, — N. H. —, 140 Atl. 176, Jan. 3, 1928, one question in issue was the public or private character of the road where a crossing existed. The supreme court of New Hampshire said that if the crossing were on a highway and if it might be assumed that the cross-arm sign in general use would have been prescribed by the Public Service Commission (P. L. Chap. 249, § 14), its location on either side of the road and on either side of the crossing would appear to be a full compliance with the statute.

The New Hampshire Commission held that a statute requiring a street railway to contribute towards the expense of highway crossing protection where its tracks cross those of a steam railroad, has no application to a street railway which is permanently operating motor busses in place of street cars which it has abandoned. Re Keene Electric R. Co. D-1076, Order No. 1885, Feb. 16, 1927.

Expediency is equally as important as necessity in determining whether or not a grade crossing should be eliminated. Re Baltimore & O. R. Co. (Ohio) Cause No. 5005, May 15, 1928.

INDIANA PUBLIC SERVICE COMMISSION.

CITY OF HAMMOND

v.

HAMMOND, WHITING & EAST CHICAGO RAILWAY
COMPANY et al.

[No. 9497.]

Street railways — Repaving ordinance — Poverty.

1. Financial embarrassment of a street railway company was held to be no defense to an ordinance declared reasonable by the Commission which required the company to raise its tracks to conform with a new level in a street which was to be repaved by the city, p. 582.

Franchises — Indeterminate permit — Failure to obey ordinance.

2. A street railway was ordered to obey a city ordinance requiring P.U.R.1928E. 37

it to raise its tracks to conform with the proposed level in the repaving of a street within fifteen days or have its indeterminate permit revoked, p. 583.

[September 21, 1928.]

COMPLAINT of a city against failure of a street railway company to obey an ordinance; company ordered to obey within fifteen days.

Appearances: Gerald Gillett, City Attorney, for city of Hammond; Crumpacher & Friedrich, Attorneys, for Hammond, Whiting & East Chicago Railway Company.

Ellis, Commissioner: On August 25, 1928, the city of Hammond, Indiana, a municipal corporation, filed with the Public Service Commission of Indiana a complaint against the Hammond, Whiting & East Chicago Railway Company and the Chicago Title & Trust Company, trustee, which, omitting caption and signature, is as follows:

"Comes now the city of Hammond, Indiana, a municipal corporation, and represents and shows to the Public Service Commission of Indiana as follows:

"That the complainant city of Hammond, Indiana, is a municipal corporation, duly organized and existing, and that it has been so organized and existing in excess of thirty-five years.

"That the defendant Hammond, Whiting & East Chicago Electric Railway Company is a corporation duly organized and existing under the laws of the state of Indiana as an electric street railway company, and that such defendant as such electric street railway company has been operating an electric street railway over certain public streets in the city of Hammond, Indiana, since the first day of March, 1904, and for a long time prior thereto.

"That the defendant Chicago Title & Trust Company, trustee, is an Illinois corporation, with its principal office at 69 West Washington street, in the city of Chicago, Illinois; that said Chicago Title & Trust Company, trustee, is a trustee under a certain indenture of trust whereby it acquired certain rights in the physical properties of the Hammond, Whiting & East Chicago Electric Railway Company; that this complainant does not have a copy of said indenture of trust and cannot set forth the P.U.R.1928E.

contents of said trust more fully than it has done, but complainant charges that said Chicago Title & Trust Company, trustee is an interested party in this proceeding.

"That on the first day of March, 1904, said electric street railway company, by Ordinance No. 2094 of the city of Hammond, Indiana, was given certain rights with respect to the operation of a street railway over certain public streets in the city of Hammond, Indiana, and that by said ordinance said street railway company was given authority to operate a street railway particularly on Hohman street from Conkey avenue northward to Gostlin street, in said city; that Hohman street, during all of said time, has been and now is a public street in the city of Hammond, Indiana, and heavily traveled by vehicles and pedestrians, and is the principal artery or highway through Hammond, Indiana, between the southernmost limits of said city and the Chicago city limits on the north.

"That thereafter and pursuant to said ordinance said street railway company proceeded to operate a street railway from said Conkey avenue northward to Gostlin street over Hohman street, thence west on Gostlin street to Sheffield avenue and thence to the Illinois state line, where the tracks of said company join with certain street railway tracks in the city of Chicago, Illinois, and in the state of Illinois, furnishing transit from the city of Hammond, Indiana, thereafter into the city of Chicago.

"That said street railway continued to operate an electric street railway over said Hohman street as herein referred to continuously thereafter, and is now so operating said electric street railway; that complainant does not specifically mention the other streets over which said street railway company operates, for the reason that at this time the question of the action of the street railway company on such other streets is not pertinent to the present complaint.

"That thereafter and on June 15, 1921, said Hammond, Whiting & East Chicago Electric Railway Company surrendered its franchise from the city of Hammond, Indiana, and thereafter and is now operating said street railway company in the city of Hammond, Indiana, and particularly over said Hohman
P.U.R.1928E.

street, as herein referred to, under authority of an indeterminate permit issued to it by the Public Service Commission of Indiana.

"That the Board of Commissioners of Lake county, Indiana, have executed with the Public Construction Company, a road contractor, a certain contract for the pavement of said Hohman street, particularly that portion of Hohman street between Hoffman street on the South and Gostlin street on the north, two intersecting streets intersecting said Hohman street at right angles.

"That said contract not only has been let, but that the pavement on either side of the railway tracks of the street railway company herein referred to has been actually installed, but that said contractor is unable to proceed to pave that portion of the street embraced within the right of way of the street railway company and occupied by its tracks for the reason that the tracks of said street railway company have not been raised to the present grade as established by said improvement proceeding.

"That after a portion of the said improvement was in, as hereinbefore recited, namely the concrete strips on either side of said street railway company's tracks, the said street railway company was requested to raise the grade of its tracks to conform to the present grade of Hohman street as established by said improvement proceeding, but that said street railway company declined and refused to raise its tracks to conform with said grade.

"That as a result the contractor has been unable to proceed with the improvement in the center of said street and the center of said street is not paved and not available for traffic, with the result that Hohman street, between said Hoffman street and Gostlin street, has been closed to traffic and traffic has been diverted around that portion of the street.

"That on August 3d, 1928 the Board of Public Works of the city of Hammond, Indiana, adopted the following resolution with respect to the matter of the raising of the tracks of said street railway company to conform with the grade of said street, as follows: [Resolution and ordinance omitted.]

"That the necessity of the raising of said street car tracks to P.U.R.1928E.

conform to the present grade of said Hohman street is fully set forth both in the resolution of the board of public works of the city of Hammond, Indiana, and in the ordinance adopted by the common council of the city of Hammond, Indiana.

"That the requisite time has expired as fixed by said ordinance, but that the said street railway company has declined and refused to take any steps toward compliance with the terms of said resolution or ordinance, and complainant charges that it will take no steps in the future to comply with the terms of said ordinance in any way unless coerced so to do by the order of this Commission.

"That the city of Hammond, Indiana, through its legislative body, the said common council of said city, has determined the duty of the street railway company with respect to the matter of the condition of its tracks, and that under the law said determination is in force and is *prima facie* reasonable; that the conformation of said railway tracks to the grade of said street is reasonable and necessary in the interest of the public, and that great urgency exists with respect to the matter of the raising of said tracks.

"That, as hereinbefore charged, said street railway company and its trustee hereinbefore named, willfully decline and refuse to comply with said ordinance and to raise their tracks as in said ordinance and resolution provided for.

"That this Commission should determine the reasonableness and validity of said action by the city of Hammond, Indiana, with respect to said street railway company, and that, upon the determination of the reasonableness and validity of said action, an appropriate order should be made in the situation coercing said street railway company and its trustee to comply forthwith with the terms of said ordinance.

"Wherefore, complainant city of Hammond, Indiana, a municipal corporation, complains of the defendants Hammond, Whiting & East Chicago Electric Railway Company and Chicago Title & Trust Company, trustee, and prays that the Public Service Commission of Indiana shall determine said ordinance of the city of Hammond, and the action of the board of public works of Hammond, Indiana, to be reasonable and just in the P.U.R.1928E.

circumstances and valid, and that an appropriate order issue in the situation commanding and directing the said two defendants forthwith to comply with the terms of said ordinance, and providing that upon a noncompliance with the order of this Commission the indeterminate permit of said railway company shall be revoked and rescinded and held for naught, and this complainant asks all other relief in the premises which may seem to the Commission just and meet."

Pursuant to notice to interested parties and legal publication, a hearing was held on said petition on September 13, 1928, at Indianapolis, Indiana. At the time of the hearing the respondent, Hammond, Whiting & East Chicago Railway Company filed its answer.

The evidence showed that Hohman street is one of the principal streets of the city of Hammond; that the averments of the petition in regard to the paving of said street are true. That the paving of a portion of the center of said street cannot be completed because the tracks of the respondent, Hammond, Whiting & East Chicago Railway Company, are below the grade of the proposed pavement. That the city of Hammond, by Ordinance No. 2094, has required said respondent, Hammond, Whiting & East Chicago Railway Company, to raise its tracks. That respondent, Hammond, Whiting & East Chicago Railway Company, has refused to comply with the terms of said ordinance, pleading its financial inability to carry out the work necessary to meet the provisions of the ordinance. The situation, as shown by the evidence, briefly is this: One of the principal streets of the city of Hammond, which is the logical outlet for traffic into the adjacent city of Chicago, Illinois, is now closed to traffic between Hoffman street on the south and Gostlin street on the north, because the pavement on either side of the car tracks is laid and the work of completing the pavement between the tracks cannot be carried out because of the refusal of the respondent to raise its tracks to the grade of the new pavement.

[1] Business houses and residences situated along the portion of Hohman street in question cannot be reached by vehicle traffic. Great public inconvenience is being caused and such inconvenience will continue until this situation is remedied. Unless
P.U.R.1928E.

some immediate action is taken it appears that the situation is liable to continue during the coming winter season. The only defense made by the respondent was its financial inability to raise its tracks. The only estimate as to the cost of raising the tracks was made by the respondent and includes the rehabilitation of the tracks. If such estimate is correct, the cost of raising the tracks or of raising and rehabilitating the tracks is not a large item when considered in connection with the great public inconvenience being caused by existing conditions.

The respondent surrendered its franchise from the city of Hammond, June 15, 1921, and is now operating under authority of an indeterminate permit issued to it by the Public Service Commission of Indiana.

The Commission is of the opinion that the plea of the respondent of its financial inability to carry out the work necessary to raise its tracks should not be controlling in this cause. The Commission is of the opinion that the ordinance of the city of Hammond heretofore mentioned in this order and the requirements thereof are reasonable. The Commission is further of the opinion that the evidence in this cause warrants the revocation of the indeterminate permit of the respondent unless immediate action is taken to raise the tracks along the portion of Hohman street heretofore referred to.

Certain reference was made at the hearing and the introduction of certain evidence was permitted by the Commission in regard to the condition of the tracks of the respondent on other streets of the city of Hammond for the purpose only of having the entire situation before the Commission. Since the matters involved in connection with these streets are not formally before the Commission, no action will be taken in regard thereto.

[2] It is therefore *ordered* by the Public Service Commission of Indiana, that the respondent, Hammond, Whiting & East Chicago Railway Company, shall, within a period of fifteen days from the effective date of this order, begin work in connection with the raising of its tracks on Hohman street, as required by Ordinance No. 2094 of the city of Hammond, Indiana; provided, that in the event such work has not been begun within fifteen days after the effective date of this order and completed P.U.R.1928E.

within a reasonable time thereafter, that an order will be entered by the Public Service Commission of Indiana revoking the indeterminate permit of respondent, Hammond, Whiting & East Chicago Railway Company.

Singleton, McCardle, Harmon, McIntosh, Commissioners, concur.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

LOS ANGELES RAILWAY CORPORATION

v.

RAILROAD COMMISSION OF STATE OF CALIFORNIA.

[In Equity N-115 J.]

(— F. (2d) —.)

Pleadings — Motions to strike — Constitutional complaint.

1. Motions to strike unnecessary or objectionable allegations in a complaint, which on the whole gives to the court an understanding of the material facts and conditions upon which the plaintiff rests its contention of infringement of its constitutional rights, will be overruled, p. 589.

Courts — Federal courts — Jurisdiction.

2. The duty of the United States Court is to take jurisdiction of any case where the facts show that such court has jurisdiction where the plaintiff has neglected to sue in the Federal tribunal, p. 590.

Constitutional law — Due process — Unlawful state regulation.

3. A State Commission exercising its powers of regulation in such an unreasonable manner as to prevent a carrier from obtaining a fair return upon its property devoted to public service, is acting contrary to the due process provision of the 14th Amendment to the Constitution, and such action is accordingly void, p. 590.

Injunction — Exhaustion of state remedies — Federal Court.

4. It is the duty of the Federal Court to issue an injunction against the State Commission where there is a clear showing that rates ordered by the latter are confiscatory, notwithstanding the fact that a state statute allows an appeal to the supreme court of the state from the order of the State Commission, p. 590.

Rates — Constitutional provision — Municipal control.

5. A constitutional provision expressly reserving to a State Commission from the time of its creation, the entire control over rates of P.U.R.1928E.

public utilities, operates to divest municipalities of all such powers previously exercised to control rates or to contract with respect thereto, p. 592.

Injunction — Federal jurisdiction — Contractual relations.

6. The Federal Court has power to issue an injunction against a State Commission's orders regulating the rates of a utility having a franchise with a city where the contractual relationship between the city and the utility had been terminated by provision of the State Constitution granting the Commission the entire control over utility rates, thereby superseding the right of the city in this respect, p. 592.

Constitutional law — Due process — Contractual rates — Federal Court.

7. The Federal Court has jurisdiction to declare confiscatory and unconstitutional an order of a State Commission which has actually exercised its superior regulatory powers in setting aside a rate fixed by contract between a utility and a municipality, p. 594.

Valuation — Bus property — Street railways.

8. There is no discrimination in the inclusion of unprofitable bus operation in estimates of valuation of railway properties in a complaint against a valuation order of a State Commission also including such properties, p. 600.

[September 10, 1928.]

APPLICATION of a street railway company in the United States District Court for an interlocutory injunction restraining the Railroad Commission from denying increased rates; granted.

Before Hunt, Circuit Judge, and James and Sawtelle, District Judges.

By the Court: Plaintiff's electric car tracks occupy public streets in Los Angeles under franchises granted by the city, and county, of Los Angeles. Its bus lines are operated under permits granted by the county. In some of the franchises for electric lines there are provisions that the rate of fare shall not exceed five cents except under a proper showing before a competent authority having jurisdiction over rates of fare that such greater rate is justified; in others there are clauses that the rate of fare for any distance one way shall not exceed five cents for one passenger. A franchise ordinance adopted in December, 1924, provides, among other matters, that the grantee may operate in accordance with and limited only by the statutes of California applicable thereto, that the rate of fare for any distance shall
P.U.R.1928E.

not exceed five cents for one passenger, that there shall be transfers and that the franchise is granted upon each and every condition set forth in the instrument and that a failure to comply with each and any of the conditions of the franchise would work an immediate forfeiture of all the rights granted. From and after 1910 plaintiff had charged a basis fare of 5 cents for a continuous ride in the same general direction. Free transfers with half fares to school children and students on the electric lines, and 10 cents on motor bus lines are the only rates now charged and collected. In 1918 the plaintiff requested the Railroad Commission to make an investigation of its service and condition with a view to stabilization of its financial affairs. In May, 1921, the Commission issued a permissive order (19 Cal. R. C. R. 980, P.U.R.1922A, 66) authorizing the plaintiff within thirty days to increase its basic fare to 6 cents; but by advice of Henry E. Huntington, who at that time owned all of the stock of the company except a few qualifying shares, the authorized increase was not adopted, for the reason that Huntington believed the company should be put in a reasonably satisfactory financial condition as had been recommended by the Railroad Commission of the state. As of September 30, 1926, there had been issued 200,000 shares of common stock of a total par value of \$20,000,000, upon which dividends in bonds only, in the sum of \$1,500,000, and not more, had been paid since 1911, the last payment having been made in December, 1913.

Plaintiff alleges that the plan advised was impossible and that plaintiff at the time of the filing of the bill herein was indebted to the estate of Huntington in a sum exceeding \$8,000,000; that its financial condition grew worse until November, 1926, when it applied to the Commission for permission to establish a basis fare of 7 cents with 4 single fare tokens for 25 cents and with free transfers and half fares for school children and students. In asking for the increase the company set up that the cost of money was not less than six and one half per cent, which was greater than the return possible for it to earn under the basic 5-cent fare, and that under the proposed increased fare the annual return would be less than seven per cent per annum. Hearings were had by the Commission, and about May 17, 1928, the P.U.R.1928E.

company requested permission to put in effect, temporarily, a basic rate of 6 cents, pending the final outcome of the investigation into the merits of the application it had filed. In its last referred to application the company averred that it was confronted with an emergency in that it could not proceed with capital expenditures urgently needed, for the reason that it could not issue the necessary securities without the consent of the Commission, and that such consent could not be had until there could be a showing of adequate earnings which, in turn, could not be presented until the rate of fare was raised and that unless the rate was increased there would be a loss of a minimum of two million dollars during the year 1927. On June 20, 1927, the application was denied, the opinion of the Commission being that to what extent the company was being damaged by continuing the 5-cent fare depended upon a determination of the major issues involved in original applications. After further hearings the Commission, on March 26, 1928, made an order (Decision No. 19521, P.U.R.1928D, 75) denying the right to increase fares, and finding among other things, that the basic fare of 5 cents was just and reasonable. Rehearing was denied and the order (Decision No. 19521, *supra*) stands.

As part of the evidence presented by plaintiff to the Commission in the course of its investigation, was a detailed joint report on the valuation and financial and other conditions of the plaintiff's property in 1923, 1924, and 1925, made by the engineer of the Railroad Commission, the engineer of the Board of Public Utilities of the city of Los Angeles, and the consulting engineer of plaintiff company. The report contained values of the plaintiff's property as of December 31, 1924, on bases for certain elements of value, provided, so the report stated, it was lawful to include such elements in a valuation. The agreed figures were: Reproduction cost new, \$54,256,795; reproduction cost new less depreciation, \$39,998,891; historical reproduction cost, \$41,678,050. These tabulations carried to December 31, 1926, make total reproduction cost new, \$58,796,027; reproduction cost new less depreciation, \$39,774,264; historical reproduction cost, \$44,695,098. The totals just given do not include amounts for working capital or intangible items. Plaintiff avers P.U.R.1928E.

that the report demonstrated that under existing rates its property during the years 1926 and 1927 had been confiscated to the extent of approximately \$4,700,000, and that at the time of the filing of this suit was being confiscated by reason of the existence of the 5-cent fare in a sum of not less than \$7,000 per day, and that unless the fares are increased the property will continue to be confiscated in an ever-increasing amount. Plaintiff prays for an order enjoining the enforcement of the decision and order of the Commission and thereby continuing the violation of its rights under the Constitution of the United States.

By motion to dismiss the Commission raised the question of the jurisdiction of the Federal court, and whether or not the complaint stated grounds for equitable relief. There was also a motion to strike a number of allegations in the complaint, on the ground that they were redundant and merely evidentiary. At the hearing before us it was suggested that inasmuch as the motions involved the legal questions determinative of the whole case, the answers which counsel for the Railroad Commission and for the city of Los Angeles stated they had prepared, might be filed at once, and thus the merits of the controversy could be better presented to the court for final disposition. Accordingly, the Commission and the city filed separate answers and after argument the matter was submitted.

The answer of the Railroad Commission pleaded that the reason why the railway company did not avail itself of the right to increase the fare to 6 cents was that it was earning at that time a greater return upon the fair valuation of its property than was reasonable or fair; denied all material allegations of confiscation, present or probable; denied that the value of the property of plaintiff is in excess of \$42,000,000 or that it was ever agreed that the alleged joint report as to valuations should control as a proper estimate; alleged that $6\frac{1}{2}$ per cent upon the value of \$43,000,000 is a fair return; averred that the orders of the Railroad Commission were all in accordance with the evidence before the Board, and that the financial condition of plaintiff arises from an improper and unwise policy with respect to the proportion of bonds to stock now outstanding on the system and its subsidiaries; alleged that in making up its valuation P.U.R.1928E.

figures the railway company has included properties devoted solely to auto bus service as distinguished from street car service; that the bus fares are upon a higher and greater plane than the street car fares and that an increase in the street car fares without an existing increase in bus fares would create an unfair discrimination as between plaintiff's patrons and classes of patrons; that plaintiff's system to a larger degree is antiquated in the various respects pointed out in the answer.

The answer of the city of Los Angeles, intervener, as party defendant, is in most material respects substantially like the answer filed by the Railroad Commission. It also pleaded the terms and conditions of franchises granted to the plaintiff, by some of which the rate of fare for any distance one way should not exceed five cents for one passenger, and alleged that a certain number of the franchises provide that the rates of fare shall not exceed $2\frac{1}{2}$ cents per mile for any distance, provided that no fare be less than five cents; that a certain number of franchises limit the fare to 10 cents with power in the board of supervisors to establish at any time a fare not exceeding ten cents and not less than five; that one franchise provided that the rate should not exceed three cents per mile; that all the franchises granted by the city were granted in accordance with the provisions of the Constitution of California and the general laws of that state and the charter of the city of Los Angeles and ordinances duly passed; that subsequent to March 2, 1920, certain franchises contained limitations providing a change in cost of five cents except where such change might be made by consent of an authority with power to make a change.

[1] We can dismiss the several motions to strike portions of the complaint by saying that while, doubtless, there are some allegations of unnecessary facts and some averments which, construed strictly, may be objectionable as merely evidential, nevertheless, the whole complaint gives to the court an understanding of the material facts and conditions upon which the plaintiff rests its contention that by requiring operation under the present fares its constitutional rights have been and are being, and unless relief be given, will continue to be invaded and infringed. We, therefore, overrule the motions to strike, and pass to the more P.U.R.1928E.

important grounds included in the motions to dismiss, and the answers.

[2] Upon the jurisdiction of the Federal Court, it is enough to say that when the facts show that a court of the United States has jurisdiction, the duty of the court is to take jurisdiction, and where one has a case within the jurisdiction of the Federal tribunal, his right to choose a Federal Court cannot properly be denied. (*Willeox v. Consolidated Gas Co.* 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 48 L.R.A.(N.S.) 1134, 15 Ann. Cas. 1034).

[3] No one at this day will dispute the power of a state to regulate the conduct of railways within the borders of the state, acting through a Board or Commission whose duty it is to accomplish such regulation; but in the recognition of such power of regulation by the state over common carriers and in accord with the scope of such power, the Supreme Court has distinctly laid down the rule that the property of the railways is under the protection of the fundamental guaranties of the Constitution, and is, therefore, justly entitled to the protection of the law, and there is no power under which such property can be taken from its owner without just compensation or without due process of law. (*Wisconsin M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115). And closely applicable to the case under consideration is the principle that if the power of regulation by a State Commission is exercised in such an unreasonable manner as to prevent the carrier from obtaining a fair return upon the property invested in the public service, it passes beyond lawful bounds, and the action in the exercise of the power is void because repugnant to the due process of law provision of the 14th Amendment to the Constitution. (*Mississippi R. Commission v. Mobile & O. R. Co.* 244 U. S. 388, 61 L. ed. 1216, P.U.R.1917E, 791, 37 Sup. Ct. Rep. 602.)

[4] Section 67 of the California Public Utilities Act provides that within thirty days after petition for rehearing is denied by the Railroad Commission, the applicant may apply to the Supreme Court of the state for a writ of review, but that in the Supreme Court the case shall be heard upon the record of P.U.R.1928E.

the Commission, and the review can go no further than to determine whether the Commission has regularly pursued its authority, including a determination whether the order violates any right of the petitioner under the Constitution of the United States or of the state of California. The statutes makes the findings and conclusions of the Commission on questions of fact final and not subject to review, and requires that upon the hearing the Supreme Court shall enter judgment either affirming or setting aside the order of decision of the Commission. That the review contemplated by the statute is judicial in its character has been determined by the supreme court of the state in Pacific Teleph. & Teleg. Co. v. Eshleman, 166 Cal. 640, 137 Pac. 1119, 50 L.R.A.(N.S.) 652, Ann. Cas. 1915C, 822, and Napa Valley Electric Co. v. Railroad Commission, 257 Fed. 197, P.U.R. 1919E, 471, and the same case in 251 U. S. 366, 64 L. ed. 310, P.U.R.1920C, 849, 40 Sup. Ct. Rep. 174. It, therefore, seems certain that if the plaintiff in the present action had sought review of the order of the Commission before the supreme court of the state and that court had annulled the order of the Commission, plaintiff would have been obliged either to proceed anew before the Commission or to seek a writ of error to the Supreme Court of the United States, in which event, were plaintiff successful, it would have been obliged again to proceed before the Commission. But such procedure was not the only avenue through which relief might be sought, for when the Commission made the order denying plaintiff's right to increase its fares, the proceeding being judicial, the company could resort to any court having jurisdiction to afford relief. (Prendergast v. New York Teleph. Co. 262 U. S. 43, 67 L. ed. 853, P.U.R. 1923C, 719, 43 Sup. Ct. Rep. 466). In Minnesota R. & Warehouse Commission v. Duluth Street R. Co. 273 U. S. 625, 71 L. ed. 807, P.U.R.1927B, 712, 715, 47 Sup. Ct. Rep. 489, the Court considered the one question whether the street railroad company had the right to go into the Federal Court when it did, and whether its suit was premature because of the state statute allowing an appeal to the supreme court of the state from the order of the State Commission, and held that it should be remembered that the requirement that state remedies be exhausted P.U.R.1928E.

"is not a fundamental principle of substantive law but merely a requirement of convenience or comity." It follows that if there is a clear showing that the rates to which the company is confined are confiscatory, the duty of the Federal Court is to issue injunction.

[5, 6] The city would avoid the applicability of these general principles by contending that although admitting the franchise rates are subject to change by the State Railroad Commission, nevertheless the franchises are contracts between the parties, and that, therefore, no substantial Federal question is presented and the Federal Court is without jurisdiction to grant plaintiff the injunctive relief it asks. Briefly answering this contention, we think it may well be doubted whether the state of California ever delegated power to the city to contract with a public utility on the subject of rates so as to restrict future regulation. Since the adoption of Article XII, § 23 of the Constitution of the state on November 3, 1914, the entire control over rates of public utilities has been expressly reserved to the Railroad Commission from the time of the creation of that Commission. By that constitutional provision municipalities were divested of all power over rates. That article provided that from the time of the passage by the legislature of laws conferring power upon the Railroad Commission respecting public utilities, all powers respecting such utilities vesting in boards of supervisors or municipal councils of the several cities in the state should cease so far as such powers might conflict with the powers conferred upon the Railroad Commission; provided that the section should not affect such powers of control over public utilities as relate to the making and enforcement of local and police regulations "other than the fixing of rates vested in a city;" and provided, further, that where any such city shall have elected to continue any of its powers to make and enforce such local regulations other than the fixing of rates, it might thereafter by a vote of its qualified electors surrender such powers to the Railroad Commission; and provided, further, that the section of the Constitution referred to should not affect the right of any city to grant franchises for public utilities upon the terms and conditions and in the manner prescribed by law. Section 497 of the Civil Code P.U.R.1928E.

of California of 1891, page 121, provides that authority to lay railroad tracks through streets of a city could be obtained for a term of years not exceeding fifty, from the council under such restrictions and limitations and upon such terms as the city may provide. By the Franchise Act of 1893 (California Statute 1893, p. 288), a franchise to construct or operate railroads upon any public street of a city or to exercise any other privilege proposed to be granted by the common council shall be granted upon the conditions of that act and not otherwise. We perceive no provision in that act by which power is given to the city over rates to be included in any franchise granted. The statute of 1901, page 265, and its amendments provided that municipalities could grant franchises upon the conditions in the act provided and not otherwise, but there were no words expressly delegating power to a city to fix rates by contract, and as said by the Supreme Court in *Home Teleph. & Teleg. Co. v. Los Angeles*, 211 U. S. 265, 275, 53 L. ed. 176, 29 Sup. Ct. Rep. 50, the first section of the act contained "an emphatic caution against reading into the act any conditions" not clearly expressed in the act itself. No decisions of the supreme court of the state directly decide the question, and we pass it, merely saying that we are inclined to the view that in the absence of an express grant to the city of power to fix binding rates in franchises, no such power exists; nor can it be implied under the language of the act of 1901, or other statutes called to our attention. (*Stanislaus County v. San Joaquin & K. River, Canal & Irrig. Co.* 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241; *San Antonio v. San Antonio Pub. Service Co.* 255 U. S. 547, 65 L. ed. 777, P.U.R.1921D, 412, 41 Sup. Ct. Rep. 428; *San Francisco-Oakland Terminal R. Co. v. Alameda*, 226 Fed. 889; *Knoxville Gas Co. v. Knoxville*, 261 Fed. 283, P.U.R.1920B, 901). It is perfectly clear, we think, that at least since the adoption of the constitutional provision heretofore cited, any provision with respect to rates in franchises granted since 1914 could not be considered as binding contracts of inviolable nature.

"*Denney v. Pacific Teleph. & Teleg. Co.* — U. S. —, 72 L. ed. —, P.U.R.1928C, 408, 48 Sup. Ct. Rep. 223 (decided Feb. P.U.R.1928E.

20, 1928) involved an order of the Department of Public Works of Washington finding that existing rates charged by the telephone company were just, fair, and reasonable and that certain proposed increased rates were unjust, unfair, and unreasonable and that the application for increased rates should be denied. The Court stated that the Department of Public Works had made its investigation without regard to the franchise rates which designated maximum permissible rates, thus disregarding the contention that the franchise rates were contractual and, therefore, could not be confiscatory in a constitutional sense. The Court affirmed the view of the supreme court of the state, that the questions presented were unaffected by the franchise rates, and held that the public body had the power to fix reasonable and compensatory rates irrespective of any previous municipal action."

[7] We prefer to rest our decision upon the ground that even upon the assumption that the city had power to fix the utility rate by contract and that the rate provisions contained in the franchises granted to plaintiff did constitute contracts, nevertheless, the rates specified in the provisions of the franchises have been changed by the exercise of the police power of the state. It appears that in 1921 the Commission granted plaintiff company authority to increase its rates over the basic 5-cent fare which was then in force. There were in force and effect at that time 102 out of 116 franchises granted to plaintiff or its predecessors. Since May, 1921, fourteen other franchises have been granted. When the Commission in 1921 made its order changing the basic 5-cent fare, it authorized plaintiff to file with the Commission and put into effect thirty days from the date of the order, a schedule of rates increasing the then-present basic fare of 5 cents to 6 cents, and directed that tickets or tokens be put on sale. That plaintiff company did not avail itself of the right to the increase does not affect the fact that the Commission exercised its exclusive jurisdiction to regulate rates by making and finding that the rates provided for in the franchise granted to plaintiff were inadequate, and that the 6-cent fare
P.U.R.1928E.

authorized was a just rate. The Commission in its decision said:

"If adequate street railway service is to be given in Los Angeles, there appears to be no possibility for the company to secure the necessary revenue under a continuation of the flat 5-cent fare. An increase in the fare in some form, we are satisfied, should be authorized if street railway service is not to suffer and great injury is not to result to the development of the city." (19 Cal. R. C. R. 980, 999, P.U.R.1922A, 66, 90).

The order authorized the company to put into effect within thirty days from the date of the order a schedule of rates increasing the basic 5-cent fare to 6 cents, provided that tickets or tokens be put on sale at the company's offices, on the company's cars, and at such points as the company may select, in blocks of 10 tickets or tokens at a total cost of 50 cents for each block; and provided further that the single 6-cent fare, as also the reduced rate ticket or token fare, shall retain transfer privileges as then in existence.

Furthermore, we are of opinion that the proceeding before the Railroad Commission (Application No. 13323, P.U.R. 1928D, 75) out of which the present suit grew, must be held to have been a complete exercise by the Commission of its power over the rate specified in the franchises granted to plaintiff. How could it be otherwise? The Commission received and considered original and supplemental applications for an increase made by plaintiff. It carried on an extensive investigation lasting from November, 1926, until March, 1928, when it made its finding that the 5-cent fare allowed to plaintiff was not an unreasonable return, and that under that rate and the method of operation for the year ending December 31, 1927, the return was approximately 4.9 per cent. The finding of the Commission rested upon detailed figures concerning the valuation of plaintiff's property. The practical result of the conclusion and order of the Commission was to prevent the company from obtaining a fair return upon its property invested in the public service. Its order was none the less effective in denying permission to raise an existing rate inasmuch as the necessary effect P.U.R.1928E.

was to enforce the existing rate, which would effect confiscation of plaintiff's property. (Mississippi R. Commission v. Mobile & O. R. Co. 244 U. S. 388, 61 L. ed. 1216, P.U.R.1917E, 791, 37 Sup. Ct. Rep. 602).

We, therefore, hold that the denial of permission to raise the existing rate, followed as it was and is by the necessary effect of enforcing the rate, was an exercise of jurisdiction and that a situation was created wherein the power of the Federal Court to enjoin, if confiscation is effected by the order, is ample.

Let us briefly look at the facts as set forth in the pleadings and the exhibits made parts thereof, which included the evidence before the Commission.

We accept as a criterion the rule approved in *Smyth v. Ames*, 169 U. S. 466, 546, 42 L. ed. 819, 18 Sup. Ct. Rep. 418, that the basis of all calculations as to the reasonableness of rates to be charged by a carrier such as plaintiff is, must be the fair value of the property being used by it for the convenience of the public, and that in finding such value, among the principal proper elements to be considered are "original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present, as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses." These elements together with amounts to pay taxes and proper operating charges and any going concern value that there may be, are essential to be considered in arriving at a conclusion upon the all important question whether the carrier is enjoying a fair return upon the value of the property employed by it for public convenience. What, therefore, was established as the reasonable value at the time of the investigation by the Commission, and what may be taken to be such value for a reasonable time in the immediate future? (*San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. Rep. 571; *McCardle v. Indianapolis Water Co.* 272 U. S. 400, 71 L. ed. 154, P.U.R.1927A, 15, 47 Sup. Ct. Rep. 144.)

Expert evidence in plaintiff's behalf, based in large part upon P.U.R.1928E.

the inventory and values made by concurrent action heretofore mentioned in 1923 and 1925, computed the total values as of December 31, 1926, and December 31, 1927, as follows:

For 1926

Reproduction cost new less depreciation, straight-line basis, \$45,217,653; Reproduction cost new less depreciation, 70 per cent condition, \$46,129,344; Historical reproduction cost, \$49,-240,186.

For 1927

Reproduction cost new less depreciation, straight-line basis, \$46,231,320; reproduction cost new less depreciation condition 70 per cent, \$47,137,864; historical reproduction cost, \$50,435,-823. Items included in the valuations are operative physical property, capital expenditures called for during the eighteen months following the dates of the valuations working capital, and a going value. The defendant Commission filed an affidavit made by one of the engineers (Cooper) who had had long and varied experience in making valuations of public utilities and had participated in the so-called joint report of valuations from 1923 to 1925, which was before the Commission in the rate proceeding respecting rates of the plaintiff carrier (Application No. 13323, P.U.R.1928D, 75). His computations vary from those made by plaintiff's witnesses. He puts the value at \$41,-914,052 and included allowance for material, supplies, and future capital expenditures, based upon historical reproduction cost, which included estimated market value of the land as of the date of the valuation, plus the estimated cost of the other physical property at the time of the installation of the various items, plus overhead expenditures for engineering, law, interest, and similar charges. In his estimate he took \$42,000,000 as the highest figure to be accepted as a rate basis, and calculated the net income and per cent return derived from the operation of plaintiff's street railway and bus system from 1922 to 1926 as follows:

P.U.R.1928E.

UNITED STATES DISTRICT COURT.

Years.	Net Income.	Per Cent Return.
1922	\$3,043,669	9.7
1923	3,278,232	9.4
1924	2,879,307	7.4
1925	2,090,910	5.2
1926	1,910,466	4.6

It is true that during the argument plaintiff vigorously contended that the Commission failed to give due weight to the evidence before it as to depreciation of plaintiff's various properties, and that it adopted an arbitrary historical reproduction cost estimate as of December 31, 1926, wherein there was no inclusion of allowances for working capital, going concern, development cost, or adequate allowances for interest during a reasonable construction period—contentions which appear to be justified, at least in part, by the evidence of Mr. Cooper produced before the Commission, to the effect that in his grand totals he had not included working capital, going concern value, nor additional capital required, but had merely covered physical properties as of December 31, 1926. But, in denying plaintiff's petition for rehearing the Commission expressly stated that in reaching its conclusion as to a fair rate basis figure it had considered all the evidence and claims of value and had made a fair allowance for "claimed intangible elements of value in the light of all the surrounding circumstances," and added that a fair allowance for reproduction costs new less depreciation would "with fair allowance for all intangible items" amount to a sum less than that found as a rate basis. It is to be regretted that the Commission did not go into particulars in its reference to the wide variation in the estimates before it pertaining to the intangible items. However that may be, we need not enter into a detailed inquiry whether or not the Commission included all of the items which Mr. Cooper says he did not consider, or any of them, as among the elements of value, or whether such items or any of them were essential in arriving at a fair value of the property, for the theory upon which the defendant rests its contentions is that the Commission did consider all of the proper factors in exercising its judgment as to the fair value of the property for rate-making purposes. With that understanding, we stated to counsel upon the argument our general view that P.U.R.1928E.

the analysis of facts and figures made by plaintiff was not sufficiently persuasive to compel a conclusion that the Commission had erred by omitting to give consideration and due weight to the factors which fundamentally entered into an ascertainment of the value of the property. Since the case has been submitted and we have studied the record we now hold that the findings of the Commission fixing the rate basis at \$42,000,000 must stand. These findings were in effect that the financial results of the operating of plaintiff's property under the operating methods in use for the year 1927, based upon the estimates which were before the Commission were as follows: Total operating revenues \$13,254,000; total operating expenses including depreciation computed on 5 per cent sinking-fund basis and taxes, \$11,185,739, leaving net income available for return, \$2,070,261. It also found that the rate of return under the fares and methods of operation of the year 1927 was approximately four and nine tenths per cent. Now, if we take operating expense allowance for depreciation as made by the engineers of the Commission, computed on the same basis as the computation for the deduction of accrued depreciation from the value of the property, the following table illustrates the fare required to produce sufficient revenue to meet total cost of service, including return of not exceeding eight per cent on the value of operative property as fixed by the Commission for any one year next after the rates go into effect:

(a) Minimum operating expenses, exclusive of depreciation and taxes, for first year after new rate takes effect	\$10,274,760
(b) Operating expenses of depreciation as estimated by Commission's chief engineer, A. C. Mott, and assistant engineer, J. E. Cooper	1,556,917
(c) Taxes	1,299,686
(d) Total operating expense, not including return (items a, b, and c)	13,061,363
(e) Total cost of service, including 8 per cent return	16,421,363
(f) Gross revenue estimated to be produced by straight 7-cent fare, without reduced tickets or tokens	16,031,171
(g) Straight 7-cent fare will produce net income available for return of (f-d)	2,969,808
(h) Plaintiff's estimated income other than for transportation	130,000
(i) Total net income available for return under straight 7-cent fare (item g plus h)	3,099,808
(j) Total net income under straight 7-cent fare will fall short of producing full 8 per cent return on \$42,000,000 by	260,192
(k) The total net income available for return under straight 7-cent fare (i) is equal to a rate of return	7.38%

P.U.R.1928E.

Obviously, by use of tokens as applied for by plaintiff in its application, the net income available for return will be considerably less.

[8] We do not believe there is merit in the suggestion that there is discrimination asked, in that the estimates of value included in plaintiff's statements comprehend bus operations which showed a loss for the year 1926. The complaint treats the plaintiff's public utility as a "street railroad corporation" operating a "unified passenger transportation system" consisting of double and single track railway and motor bus lines, etc., and in the rate base of \$42,000,000 in the Commission's decision and order there was included all of the property of the plaintiff company devoted to its bus operations. It is evident that the Commission treated the property of plaintiff devoted to its bus operations as entitled to be considered in any rate base finding of value.

Our conclusion is that plaintiff has shown very clearly that the finding of the Commission that the present rate is fair and reasonable is not supported by the evidence before the Commission, and that plaintiff's property is being confiscated, and that our power should be used to afford relief. Northern P. R. Co. v. Department of Public Works, 268 U. S. 39, 69 L. ed. 837, P.U.R.1925D, 93, 45 Sup. Ct. Rep. 412.

Let the injunction issue, with order that plaintiff company issue a refund coupon to all patrons paying fare, and that it give bond in the sum of \$50,000 to be approved by the judge, providing that if it shall ultimately be held that the new rate is unlawful, the excess represented by the coupon will be refunded upon presentation of the coupon.

Counsel may submit form of injunctive order.
P.U.R.1928E.

WISCONSIN RAILROAD COMMISSION.**RE MADISON GAS & ELECTRIC COMPANY.**

[U-3697.]

Rates — Connected load counts — Socket outlets — Electricity.

1. An agreement between an electric utility and its consumers to eliminate empty baseboard or floor sockets and the ordinary socket appliances from the connected load count was approved by the Commission as tending to reduce the number of kilowatt hours billed at rates applicable to primary and secondary blocks of energy, p. 602.

Rates — Reduction pending valuation — Electricity.

2. A reduction in electric rates believed by the Commission to its own satisfaction to be justified was not refused pending an opportunity for final valuation of utility property, p. 603.

Rates — Electricity — Wright demand schedule.

3. The Wright demand form of schedule was approved as adapted to give the customer with small installation the advantage to which he is entitled as he improves the load factor of his electrical use, p. 605.

Rates — Wright and Hopkinson schedules — Block rate and room basis.

Discussion of the relative merits of the Wright demand form of electric schedule with the Hopkinson schedule and the ordinary block rate and room basis, p. 605.

[August 27, 1928.]

INVESTIGATION on motion of the Commission into the rates, rules and practices of an electric company; rates ordered to be reduced.

By the **Commission**: A preliminary investigation of the electric and gas rates in effect in Madison having indicated that a reduction might be made and as it appeared further from informal complaints received that the rules and practices of the company, including its electric extension rules, are subject to misinterpretation and discriminatory application, a formal investigation was instituted March 14, 1928 on motion of the Commission. The lawful rates now in effect in Madison are as follows: [Schedule omitted.]

Hearings were held at Madison April 10, 1928 and July 16, P.U.R.1928E.

1928; the appearances on April 10 were: Olin & Butler, by Mr. Butler, for the Madison Gas & Electric Company; John St. John, manager for the Madison Gas & Electric Company; Frank Jenks, City Attorney, for the city of Madison; E. E. Parker, city engineer for the city of Madison; L. A. Smith, superintendent of water works for the city of Madison.

The appearances on July 16 were the same as above and: Professor Edward Bennett and Professor Alvin Meyers on their own behalf.

From the reports submitted to the Commission by the utility it appeared that a substantial reduction in revenues could be made and still leave the company a fair return on its reported book value. The fixed capital has been checked by adding net yearly additions to the appraisals made in 1908 and 1916 for gas and electric properties respectively. To the above we have added reasonable allowances for working capital, materials and supplies and for the value as a going concern, resulting in a figure which we have used in our computations of \$3,691,648.29 for the electric property and \$2,514,970.19 for the gas property. These figures do not include the 1928 budget expenditures totalling \$1,215,972 covering particularly new generating units required to protect the service but whose immediate earning capacity is questionable.

The question of service extension rules, which was one of the matters causing the institution of this investigation, has been cleared up and new rules resulting in a more equitable and liberal basis of handling service applications, have been made effective. Under these new rules it will be necessary for the company to expend considerable sums to take care of the prospective customers in the suburban districts and for a large number of these customers will be of greater immediate value than the reduction in rates made effective herein.

[1] During the hearings the question of eliminating empty baseboard or floor sockets and the ordinary socket appliances from the connected load count was discussed and an agreement reached that such sockets and appliances should be excluded. For a great many customers, especially in the residence class, P.U.R.1928E.

this will reduce the number of kilowatt hours billed at the rates applicable to primary and secondary blocks of energy and consequently reduce their cost of lighting service. A check of the effect of this change, obtained by analyzing the connected load counts of about two hundred customers selected at random, indicates a reduction in lighting bills, due to exclusion of empty sockets and of socket appliances, of something over \$13,500 per year.

[2] No complete valuation of the property of the utility has been made in connection with this case. To make the necessary inventory and appraisal will require many months or possibly a year. Until such valuation is made it will be impossible to determine just what reduction may be justified. The Commission believes, however, that the reductions provided for by this order are justified and that customers should not be required to continue to pay the present rates during the time that must elapse before a final valuation can be made.

The utility has suggested that the lighting rate be modified so as to consist of two blocks, with net rates of 6 cents per kilowatt hour for the first 90 kilowatt hours per month per kilowatt of active load, and of 2 cents per kilowatt hour for the excess. The extent of the reductions in rates for electric service as originally suggested by the company is indicated below:

General lighting service	\$34,751.87
University of Wisconsin	8,845.86
Street lighting	3,517.00
Total	\$48,114.73

To the extent that the minimum monthly bill of 75 cents covers actual use of energy which, because of the continuance of the minimum charge, will not be affected by a reduction of the primary rate, the foregoing statement exceeds the actual reduction which would result from the company's proposed change.

The agreement as to socket appliances and empty sockets, previously referred to is estimated to increase the reduction by \$13,552.51 which would make the total, except for the effect of the minimum charge, \$61,667.24.

P.U.R.1928E.

The estimate submitted by the company as to the effect of a proposed reduction in rates for gas service has been found to be in error, the reduction which would be made being materially above the company's original estimate.

The Commission is convinced that a greater reduction than that proposed by the company may reasonably be required in the electric department and this order will establish rates which will effect reductions as indicated below:

	Amount of Reduction.
Reduce primary rate from 7¢ to 6¢ net per kw. hr.	\$35,751.87
Reduce secondary rate from 6¢ to 5.5¢ per kw. hr.	26,192.02
Exclude socket appliances and empty sockets	13,552.51
Revise rate to University of Wisconsin	8,845.86
Revise street lighting rate	3,517.00
Total, subject to effect of continuing 75¢ minimum charge	<u>\$87,859.26</u>

The new schedule will amount to a reduction of 14.3 per cent in the primary rate and of 8.33 per cent in the secondary block, for general lighting service.

Earnings in the gas department apparently will not permit a reduction in as large proportions as in the electric department, and here, also, the necessity for a complete valuation before final disposition of the case is apparent. Nevertheless, we are of the opinion that some reduction in the rates for gas is warranted and our order will provide rates which will reduce the gross revenue from gas service, based on volume of sales in 1927, by between \$17,000 and \$18,000 per year. Because of the change which is made in the relative size of the first two blocks of the gas rate it is impossible to state exactly the effect of the reduction without analyzing the bills of all customers.

The Commission has given considerable study to the question of whether or not the type of schedule for electric service should be changed from the present Wright demand form. There has been considerable criticism of the present rate form, which criticism is in substance: (1) that the Wright demand schedule penalizes the customer for installing convenience outlets and decorative lighting, (2) that connected load counts are not kept
P.U.R.1928E.

up satisfactorily, and (3) that the method of applying the rate and computing the bill is difficult for many customers to understand.

As to the first of these criticisms the company's agreement to eliminate socket appliances and empty floor and baseboard sockets from the connected load count, should largely remove the ground for complaint. The further fact that the rates per kilowatt hour for the first two blocks of the schedule differ only slightly should eliminate practically all reason for criticism. To a degree the complaint that discrimination enters because connected load counts are not kept up to date appears to be well founded and our order will provide for a procedure which, we anticipate, will largely correct the trouble.

[3] There is no doubt that the Wright demand form of schedule is somewhat difficult to understand. However, it seems to us peculiarly well adapted to give to the customer with a small installation the advantage to which he is entitled as he improves the load factor of his electrical use. Block rates and room basis rates, though possessing the advantage of greater simplicity, gain that simplicity at the cost of introducing some element of discrimination in favor of the customer with large installation and poor load factor and against the customer with good load factor obtained by the use of a smaller installation.

Professors Bennett and Meyers of the Engineering College of the University of Wisconsin have submitted a report based upon as complete an analysis as permitted by available operating statistics of the company, in which they suggest a lighting rate of the Hopkinson demand type, with some modification of the demand charge in its proposed application. The Commission recognizes that this type of schedule when based upon scientific analysis of adequate operating statistics should distribute the cost of service somewhat more nearly in accordance with the factors from which it arises than the existing rate form. In this case however the analysis has, of necessity, been based in some part upon assumptions which, though fairly made, are not conclusive, and it is questionable whether a schedule derived from a cost analysis based upon statistics, of which a part are

P.U.R.1928E.

not practicably obtainable, would so far improve the distribution of the costs of service as to call for its adoption in this case. In type the Hopkinson schedule constitutes a rather radical departure from usual forms of lighting rates and from the form under which the marked development of use of energy has been obtained in Madison. If it represented the only means by which substantial justice to customers could be obtained or if the present rate form were unreasonably discriminatory, the situation would be quite different from that prevailing. It is our conclusion that, except as modified by this decision and order, the existing form of schedule should be continued.

MICHIGAN SUPREME COURT.**UNA ANTISDEL***v.***MACATAWA RESORT COMPANY et al.**

[No. 117.]

(— Mich. —, 220 N. W. 768.)

Service — Water — Sprinkling restriction.

1. A resort company having a limited water supply may reasonably require prospective patrons to agree to sprinkling restriction, p. 608.

Service — Extension cost — Electricity.

2. A company furnishing electric service may reasonably require, as a condition to extending service, that the patron defray construction costs which are not discriminatory, p. 608.

Service — Refusal of light for violation of water regulation.

3. A resort company furnishing both light and water may not refuse the former service because of a violation by the patron of regulations respecting water service, which are shown to have no connection with the furnishing of light, p. 608.

Electricity — Damages — Failure to serve.

4. A patron refused electric service without justification because of a failure to obey water regulations may not recover for the resulting damages where there was no separate tender of payment or demand for light service independent of water service, p. 608.

[July 24, 1928.]

P.U.R.1928E.

APPEAL from judgment of Circuit County Court in favor of resort company sued by cottage owner for alleged damages resulting from failure to supply water and light; judgment of Circuit Court affirmed.

Appearances: Fred P. Geib, of Grand Rapids, for appellant; Diekema, Kollen & Ten Cate, of Holland, for appellees.

Fead, C. J.: This is an action to recover damages for the refusal of defendants to supply water and light for 1924, and "winter circuit" light for 1924, 1925, and 1926 to three cottages of plaintiff's at Macatawa Park. The circuit court filed findings of fact and law, and rendered judgment for the defendants.

The defendant Macatawa Resort Company conducts a limited water and light service at the Macatawa Park summer resort. Defendant Miller was principal owner and manager of the corporation. The season ran from June 15th to September 15th. The rest of the year was designated the "winter circuit." There was testimony that in 1923 the plaintiff frequently violated the rules of the defendant company regarding the use of water for sprinkling. In 1924, defendant refused to supply plaintiff with water and light unless she would sign an agreement that she would not violate the sprinkling rules. She refused to sign. She made tender of the fee for water and light, but made no separate tender or demand for either. She also demanded winter lights. The defendant claimed that the winter circuit, which ran to a life saving station, had become overloaded, and it could not furnish cottages from that line, but was building a new line with which it offered to connect plaintiff's cottages on payment of the cost of \$35. Plaintiff refused to pay the cost.

The court found, and the findings are sustained by testimony, that the rules governing the use of water for sprinkling and the requirement that cottagers should sign an agreement to obey the rules were uniform to all, were reasonable, and were impartially enforced, and that the requirement that the cottage owner should pay the actual cost of connection for winter service was reasonable, and no discrimination was made against P.U.R.1928E.

plaintiff. In fact, the testimony shows that others were required to pay and did pay several times the amount asked of plaintiff.

Plaintiff relies on *Ten Broek v. Miller*, 240 Mich. 667, P.U.R. 1928B, 369, 216 N. W. 385, involving the same defendants and the same sort of service. In that case, this court held that service could not be discontinued to enforce a *collateral* matter, the building of a septic tank, which "had no relation to the duty of defendant company to furnish the light and water and receive its pay therefor." The court there recognized the right of defendant to provide reasonable rules and regulations in the conduct of its business and to decline service in case of violation.

[1, 2] The water supply of defendant was limited. Regulations regarding the use for sprinkling were proper. And an agreement to obey the regulations was reasonable and pertinent to the service. There was considerable testimony that to furnish plaintiff with winter circuit light would require an extension of defendant's line and the payment of construction cost was not an unreasonable condition, so long as it was not discriminatory.

[3, 4] In the respect that the plaintiff was refused light service for the season of 1924 because she would not fulfill the conditions applying to the furnishing of water, the refusal was unjustified as it applied to a collateral matter. There was no showing that a waste of water had any relation to the furnishing of light. The point, however, is of no benefit to plaintiff in this action because she made no tender nor demand for the light service for that season apart from the water service.

The controversy between the parties seems to have engendered considerable personal feeling fully apparent in the record. However, there was substantial testimony to sustain the findings of the circuit court, and we are not able to say that they are against the clear weight of the evidence.

The judgment is affirmed.

North, Fellows, Clark, McDonald, Potter, and Sharpe, J.J., concurred with Fead, C. J.

Wiest, J., concurred in the result.
P.U.R. 1928E.

OHIO PUBLIC UTILITIES COMMISSION.

NORTHERN OHIO POWER & LIGHT COMPANY et al.

v.

MOTOR FREIGHT, INCORPORATED.

Public utilities — What constitutes a common carrier — Automobiles.

1. A company which agrees to pick up and deliver freight, leases, or hires its equipment, or hires the owners of equipment, which includes the use of their equipment, is, in so far as it holds itself out to serve the shipping public, even though it attempts to restrict its activities to a selected type of business, a motor transportation company within the definition of statutes requiring Commission authority for such operation, p. 611.

Public utilities — Test of status — Automobiles.

2. The test which determines whether or not a given operator is a motor transportation company, can never be one which hinges solely upon the ownership or lack of ownership of vehicles in which freight is carried, p. 611.

Certificates of convenience and necessity — Evasion — Automobiles.

3. A transportation company agreeing to pick up and deliver freight through the agency of hired owners of automobile equipment and purporting to restrict its activities to a selected type of shipping business was held to be engaged in evasion of a statute requiring motor utilities using the highways to obtain a certificate of convenience and necessity, to pay taxes for the use thereof and to become subject to the regulation of the Commission, p. 612.

[August 10, 1928.]

COMPLAINT by electric railway company against alleged illegal activities of a motor freight transportation company; complaint sustained and operations ordered to cease.

By the Commission: This proceeding arises from a complaint which was filed with the Commission on April 7, 1928, against Motor Freight, Inc., by the Northern Ohio Power & Light Company and the Lake Shore Electric Railway Company. The respondent, Motor Freight, Inc., is organized under the laws of the state of Michigan with offices in Detroit, Michigan, and also in Toledo, Cleveland, and Akron, Ohio, and is engaged in transporting freight by motor truck between the above named cities. The complainants, the Northern Ohio Power & Light Company and the Lake Shore Electric Railway Company are

P.U.R.1928E.

corporations organized and existing under and by virtue of the laws of the state of Ohio and are common carriers of freight and passengers for hire by means of electric railway lines. The said complainants serve virtually the same territory as that through which the respondent operates. The case came on for hearing before the attorney examiners of the Commission on the 15th day of June, 1928.

From the record adduced it appears that the respondent owns no motor trucks though it keeps approximately fifty busy at all times; it has owned trailers at times and, if language is significant, sells equipment to those men whom it employs—the same trucks and trailers sold being used by the hired trucker to carry the freight which Motor Freight, Inc., agrees to transport. The evidence is clear that it contracts with all reputable consignors possible who possess large quantities of freight which are to be transported. In specific terms it agrees to "pick up" and "deliver." The fact is also established that the respondent charges a flat rate per pound—which varies according to distance—for all freight handled, and advertises for business almost continually.

The complainants maintain that the manner in which Motor Freight, Inc., operates makes it a public utility and a common carrier of freight for hire amenable to the motor transportation laws of the state of Ohio and ask that it be so declared by the Public Utilities Commission. It is the contention of the respondent that it does not control, operate, or manage any motor propelled vehicles within the state of Ohio or elsewhere and that, hence, it cannot be, within the definition of the laws of Ohio, a "motor transportation company." It further contends that it is not a common carrier and, hence, is not required to obtain a certificate of convenience and necessity to operate in Ohio.

The president of the respondent company testifies that it is in the business of contracting to furnish transportation for freight between points in Ohio and points in Michigan, freely admitting that it makes contracts with firms or individuals to transport or provide transportation for freight but says that the entire business of transportation is sublet to independent contractors—usually motor truck owners—over whom Motor Freight, Inc., P.U.R.1928E.

exercises no control whatsoever. The Commission, having carefully considered the testimony and all other evidence presented, finds that Motor Freight, Inc., is a motor transportation company within the definition of § 614-84 of the Ohio General Code; that it is a common carrier and that under the laws of Ohio has no legal right to operate unless it has first secured from the Public Utilities Commission of Ohio a certificate of convenience and necessity.

Here is a company which contracts to furnish transportation for freight and proceeds to carry out its contracts. It will haul for all trustworthy shippers who have an attractive business. It makes the contract with the consignor and gives a delivery receipt in its own name; it directs a trucker who owns his own trucks to pick up the goods and deliver them but that trucker makes no contract whatsoever with the consignor; the contract already exists between the consignor and Motor Freight, Inc., and is in itself virtually a bill of lading. The trucker secured by the respondent to haul the goods is a mere agent of Motor Freight, Inc., and for the purpose of taking a certain quantity of goods from the point of origin to the point of destination he is under the management and control of the respondent. Management and control of this nature is all that the laws contemplate.

[1, 2] The Commission entertains no doubt but what a company which agrees to "pick up" and "deliver" freight, leases or hires its equipment, or hires the owners of equipment, which includes the use of their equipment is, in so far as it holds itself out to serve the shipping public—even though it attempts to restrict its activities to big business—a motor transportation company within the definition as set forth by the law of Ohio. Were a distinction to be made between companies which own their own vehicles and those which lease or hire them, or hire them by hiring their owners, many freight transportation companies would find it quite profitable by those methods to evade securing certificates and paying those taxes which are required of common carriers for the upkeep of the highways over which they travel. The test which determines whether or not a given operator is a motor transportation company can never be one
P.U.R.1928E.

which hinges solely upon the ownership or lack of ownership of the vehicles in which freight is carried. The supreme court of Ohio has held that it is not essential that an operator own the vehicles which are employed under his certificate. Northern Ohio Traction & Light Co. v. Public Utilities Commission, 113 Ohio St. 93, P.U.R.1926A, 378, 148 N. E. 584. Such being the law as to a certificated motor transportation company, it follows beyond question that an uncertificated operator may be a motor transportation company in purview of the language of § 614-84 of the Ohio General Code without owning or actually possessing any equipment at all.

The respondent does not come within the classification of private contract carrier. Even though contracts were entered into with each person or firm for whom goods are carried—which is apparently not the case—the status of Motor Freight, Inc., would remain the same for the mere fact that a contract was signed in each instance is not controlling or even important. Breuer v. Public Utilities Commission, 118 Ohio St. 95, 160 N. E. 623. Motor Freight, Inc., holds itself out to the public as a motor-transportation company which will furnish carriage for large quantities of freight for hire and the effort on its part to secure only big business has the effect of creating it a common carrier to that extent but none the less a common carrier; the trucks which this company hires are, therefore, while employed by it, to the same extent, dedicated to public use. See Craig v. Public Utilities Commission, 115 Ohio St. 512, P.U.R.1927B, 845, 154 N. E. 795.

[3] The respondent has been operating and is now operating in a way which invokes severe condemnation from this Commission whose duty it is to administer the laws of the state relating to the transportation of property. The procedure which this company follows is a pure evasion and a rank subterfuge; if indulged in by carriers and tolerated by this Commission many existing transportation companies which the law seeks to protect in the interest of the public generally will be driven from the field and with them will fail those revenues which the state collects not only for the upkeep of highways but for many other purposes for steam railroads and electric railroad lines as well as P.U.R.1928E.

properly authorized truck lines will be irreparably injured. Certain it is that many other such companies would spring up unregulated and untaxed if this one could but live on and while blotting out other sources of revenue they themselves would not produce 1 cent in return. For this reason the Commission, in so far as it is concerned, decides the question for once and all.

The respondent chooses to designate itself a contracting company which agrees only to furnish transportation but this alone cannot possibly render it immune to regulation. This Commission must look upon the picture which is presented by all the facts and from that picture determine the status of a given company. In consideration of the record the duty of this body is unmistakable; Motor Freight, Inc., is clearly a motor transportation company operating as a common carrier for hire over the highways of Ohio and it is hereby so declared and it is, *ordered*, that the said respondent forthwith as of this date desist from further operation.

UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

v.

ALABAMA PUBLIC SERVICE COMMISSION et al.

[No. 414.]

(27 F. (2d) 893.)

Constitutional law — Proper court to decide question — Appeal.

1. The Federal constitutionality of a state statute need not be tested in lower Federal Court, but may lawfully be reviewed in the courts of the state where the laws of the latter provide that an appeal may be had from the highest court of the state to the Supreme Court of the United States, p. 618.

Constitutional law — Right to test criminal statute — Due process.

2. No penal statute can deprive a defendant of the right to review and test its validity in any criminal proceeding which may be instituted, p. 618.

Injunction — Opportunity for state action — Interstate commerce.

3. The Federal Court will not interfere with the orderly processes of the State Commission, acting under state laws in order that cer-P.U.R.1928E.

tain trains alleged to be engaged in interstate commerce, shall not be discontinued until the latter body has had an opportunity to investigate the matter fully and to reach a conclusion thereon, p. 618.

Interstate commerce — Evasion of state regulation — Railroads.

4. A railroad movement inherently intrastate in character cannot be converted into an interstate movement for the purpose of evading state regulation by the simple subterfuge of extending the operation a few miles over the line of an adjoining state, p. 619.

Injunction — Apprehension rather than actual wrong — Presumption favoring state.

5. An injunction by Federal Court will not be granted on the grounds of apprehension rather than an actual wrong already done to the plaintiff or imminently threatened unlawful injury by the state, since the state authorities will not be presumed to intend to exceed their powers or to act unlawfully, p. 620.

Interstate commerce — Right of state to notice of change — Railroads.

6. A state law requiring that the Commission be advised of any proposed change seriously affecting transportation, even though in interstate commerce, is well within the police power of the state, and is to be exercised for the benefit of the traveling public, with due regard to the rights of the utility to be free from confiscation, p. 622.

Commission — Purpose and success of Commission.

Discussion of the purpose and the success of Commission regulation with respect to interstate and intrastate commerce, p. 621.

[August 17, 1928.]

APPLICATION of a railroad in Federal Court for interlocutory injunction to restrain action of the Alabama Public Service Commission; denied.

Appearances: W. R. Cocke (of Cabaniss, Johnston, Cocke & Cabaniss), of Birmingham, for plaintiff; Charlie C. McCall, Attorney General, of Alabama, and J. Q. Smith, Assistant Attorney General, of Alabama, for defendants.

Before Foster, Circuit Judge and Clayton and Ervin, District Judges.

Clayton, District Judge: The plaintiff railway company is a common carrier, of freight and passengers, engaged in interstate and intrastate commerce. Its system of lines is within and through the states of Texas, Oklahoma, Arkansas, Kansas, Missouri, Tennessee, Mississippi, Alabama, and recently extended from Alabama to tidewater at Pensacola, Florida. Among P.U.R.1928E.

the lines operated by the company is one between Birmingham, Alabama, and Memphis, Tennessee, and on it is the town of Amory, in Mississippi, 125 miles from Birmingham. Besides its other stations on its line in Alabama, running from west to east, are the towns of Sulligent (101 miles from Birmingham), Crews, Beaverton, Guin, Winfield, Glen Allen, Bazemore, Eldridge, Clark, and Carbon Hill. The distance between Sulligent, the most westerly Alabama station, and Carbon Hill, 39 miles and a fraction. Prior to June 18, 1928, the plaintiff for several years operated passenger trains between Birmingham, the eastern terminus of its lines in Alabama, and Amory, Mississippi, and other points west, four trains each day east-bound, and a similar number each day west-bound; that is, to and from Birmingham. The east-bound trains were numbered 105, 107, 921, and 925; the west-bound trains, 106, 108, 922, and 926. The following was the schedule of the east-bound trains between Sulligent and Carbon Hill:

Station.	Train No. 105	Train No. 107	Train No. 921	Train No. 925
Sulligent		2:09 A.M.	12:38 P.M.	5:23 A.M.
Crews			12:45 "	5:31 "
Beaverton			12:51 "	5:37 "
Guin			1:02 "	5:48 "
Winfield		2:45 A.M.	1:17 "	6:05 "
Glen Allen			1:25 "	6:14 "
Bazemore			1:30 "	6:19 "
Eldridge			1:42 "	6:30 "
Clark			1:46 "	6:34 "
Carbon Hill		3:23 A.M.	1:56 "	6:44 "

And the schedule of the west-bound trains was as follows:

Station	Train No. 922	Train No. 926	Train No. 108	Train No. 106
Carbon Hill	10:55 A.M.	6:59 P.M.	1:35 A.M.	
Clark	11:00 "	7:04 "		
Eldridge	11:05 "	7:09 "		
Bazemore	11:15 "	7:20 "		
Glen Allen	11:20 "	7:26 "		
Winfield	11:30 "	7:38 "	2:12 A.M.	
Guin	11:43 "	7:48 "	2:28 "	
Beaverton	11:53 "	7:58 "		
Crews	11:59 "	8:05 "		
Sulligent	12:14 P.M.	8:14 "	2:48 A.M.	

On the plaintiff's line, the distance from Birmingham to Pratt City is about 7 miles, Oakwood 11, Adamsville 14, Lindbergh 19, Bessie Junction 20, Palos 21, Quinton 23, Wyatt 26, Dora 28, P.U.R.1928E.

Samoset 30, Benoit 32, Cordova 34, Alma 38, Jasper 42, McCullum 45, Hillard 49, Liston 51, Townley 53, Cedrom 56, Pocahontas 58, Carbon Hill 61, Kansas 62½, Clark 64½, Eldridge 67, Bazemore 73, Glen Allen 76, Winfield 80½, Guin 87½, Beaverton 94, Crews 98, Sulligent (Alabama 101 miles, and Gatman (Mississippi) 107 miles, Cauhorn 110, Greenwood Springs 111, Wise Gap 113, Quincy 115, Walden 119, Willecox 121, Aberdeen Junction 124, and Amory 125 miles. A simple mathematical calculation will show the distance from any small station to a larger station, where the railroad company is still giving service, notwithstanding the abandonment of trains 925 and 926.

On June 18, 1928, plaintiff discontinued the operation of trains 925 and 926 between Carbon Hill, Alabama, and Amory, Mississippi, without having made any application to, or without having obtained the approval of, the Alabama Public Service Commission, but continued their operation between Carbon Hill and Birmingham, so that the local service previously afforded by the two trains was eliminated only as to the Alabama stations of Sulligent, Crews, Beaverton, Guin, Winfield, Glen Allen, Bazemore, Eldridge, and Clark, and covering a distance of between 39 and 40 miles.

Section 9713 of the Code of Alabama of 1923 provides that:

"No transportation company . . . shall abandon all or any portion of its service to the public . . . unless and until there shall first have been obtained from the Commission a permit allowing such abandonment."

Section 9730 of the Code of Alabama is that:

"Any transportation company which willfully fails to comply with any provisions of this article or which abandons any service without first obtaining the consent of the Commission . . . shall forfeit to the state of Alabama not over one thousand dollars for each offense, the amount to be fixed by the court, and to be recovered in a civil suit by the state, instituted in the circuit court of Montgomery county, Alabama."

And § 9731 of the Code states that:

"Every violation of the provisions of this article, or of any order, decision, . . . or requirement of the Commission, or P.U.R.1928E.

any part or portion thereof, by any transportation company, is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense."

Furthermore, § 5350 of the Code of Alabama in substance stipulates that every officer, agent, or employee of any railroad corporation, who shall violate or procure or aid any violation by such common carrier corporation, of any of the statutes of the state of Alabama relating to adequate service, or who shall fail to obey, observe, or comply with any order of the Public Service Commission, relating to adequate service, shall be guilty of a misdemeanor, and on conviction shall be fined not exceeding \$1,000, to be fixed by the court, and § 5399 of the said Code provides in substance that every officer, agent, etc., of any common carrier or corporation, who shall violate or who aids or abets any violation of any order of the Public Service Commission, shall be guilty of a misdemeanor, and upon conviction shall be fined a sum not exceeding \$500 for each offense.

The plaintiff in its verified bill states several reasons why it should not be compelled to reinstate its trains 925 and 926, among these that the operation of such trains would entail great loss upon the plaintiff, and that, if the Commission should order the continuance of such trains, the excessive loss to the plaintiff would be in effect confiscatory. It is alleged that, as a typical week for trains 925 and 926 between Amory, Mississippi, the terminus of those trains in Mississippi, and Carbon Hill, Alabama, from April 15 to April 24, 1928, inclusive, train No. 925 earned a gross revenue of 15 cents per mile, and train No. 926 earned a gross revenue of 24 cents per mile, per day, and that the operating cost of each of these trains between such points equaled or exceeded \$1 per mile per day, entailing an operating loss of about 85 cents per mile per day; however, the defendants offer affidavits tending to contradict such claim made by the plaintiff.

The plaintiff avers that the ticket sales for the stations named during the month of May, 1928, divided between intra-state and interstate sales, were—Sulligent, state \$97, interstate \$441.36; Crews, state \$3.54, interstate nothing; Beaverton, P.U.R.1928E.

state \$2.15, interstate \$5.85; Guin, state \$296.71, interstate \$151.51; Winfield, state \$428.07, interstate \$289.76; Glen Allen, state \$11.26, interstate, nothing; Bazemore, state \$16.07, interstate \$10.55; Eldridge, state \$38.05, interstate \$5.80; but that the figures given for Winfield and Sulligent, both intrastate and interstate, include also ticket sales for trains 921, 922, 107, and 108.

The Federal census of 1920 gives the population of the villages, to-wit: Sulligent 1,071, Crews 163, and Beaverton 165, in Lamar county, with an estimated population of 20,000; Bazemore 100, and Glen Allen 109, in Fayette county, 20,000; Winfield 753, and Guin 596, in Marion county, 25,000; Clark, none Eldridge 125, and Carbon Hill 3,000, in Walker county, 60,000. Plaintiff also alleges, and produced affidavits tending to support the same, that for those stations which, according to its schedule, do not have the service of two trains each way a day, the would-be passenger patrons of the railroad have easy access to the larger stations of Winfield, Carbon Hill, and Guin, where additional trains stop each way.

[1, 2] We do not agree with the plaintiff's contention, set up in the bill and urged in the oral argument, that it cannot test the constitutionality of any or all of the Alabama statutes except in the Federal court. The Alabama law provides for the review of any action of the Commission in the state court. Moreover, if there be a Federal question in the case, and the plaintiff should consider itself aggrieved by the decision of the Alabama supreme court thereon, the question, of course, could be submitted to the Supreme Court of the United States for final determination. It goes also without saying that no unconstitutional penal statute can deprive a defendant of the right to review and test validity in any criminal proceeding which may be instituted. Doubtless this proposition is so elementary that amplification or further comment is unnecessary.

[3] Under the allegations of the bill, the denials of the answer, and the affidavits tending to support each such pleadings, the question is raised whether or not the Commission's continuance of the two trains would constitute any material interference with interstate commerce. In the present state of the con-

P.U.R.1928E.

troversy, the court is not sufficiently informed by the facts now before it, which seem to be in dispute, as to which contention is correct. Courts do not have the facilities for obtaining and presenting all the facts and circumstances relating to such a dispute. Such facilities are possessed by the plaintiff and by the defendant Commission. The court is entitled to the further help of each, so that all the facts pertaining to the case may be fully adduced and presented. Whether or not the continuation of the two trains shall be declared confiscatory, two factors enter into the equation—service and convenience to a substantial part of the traveling public, justifying reasonable expense of operation; or great loss entailed upon the plaintiff, wholly disproportionate to the public benefit. The Commission has not officially investigated the question, or reached any conclusion thereon; therefore, we think the court should not at this time interfere with the orderly processes of the Alabama statutes and the lawful actions of the state agents or agencies. Compare *Western & A. R. Co. v. Public Service Commission*, 267 U. S. 493, 69 L. ed. 753, P.U.R.1925D, 100, 45 Sup. Ct. Rep. 409.

[4] The plaintiff insists, also, that trains 925 and 926 were operated in interstate commerce, and that, therefore, the matter of their discontinuance or their continuance was not within the jurisdiction or control of the Alabama Public Service Commission; and, further, if the plaintiff be required to first obtain the consent of the Commission before discontinuing trains 925 and 926 west of Carbon Hill, that it would be subject to enormous fines and penalties, and its officers and agents to prosecution, in the event of the plaintiff's refusal to reinstate trains 925 and 926 into service west of Carbon Hill; that such penalties would be in hostility to due process and equal protection of the law provided by the 14th Amendment to the Constitution of the United States; and that §§ 9713 and 9730 of the Code of Alabama seek to impose an unreasonable burden upon and regulation of interstate commerce, in violation of the commerce clause of the Constitution of the United States article 1, § 8, cl. 3). Again, compare *Western & A. R. Co. v. Public Service Commission*, *supra*.

It seems to us that, if the Commission is without authority
P.U.R.1928E.

over the matter of the discontinuance of the two trains, simply because they have been operated out of Alabama and into Mississippi 24 miles, to Amory, then it would be easy for any railroad company to discontinue any of its intrastate trains without the approval of the Alabama Public Service Commission, by simply extending the operation of such trains a few miles into an adjoining state. Such would not be a use, but would be an abuse, of the commerce clause, and we think that the conduct of the railroad company here cannot be justified, because in proper cases protection is afforded to interstate commerce.

[5] As the cause is now presented, it appears that the action of the plaintiff in discontinuing the service without a petition to the Public Service Commission cannot be approved; it is based upon apprehension, not well founded, rather than upon justifying actuality—wrong done to plaintiff, or even imminently threatened unlawful injury. But under the circumstances of this case the conduct of the plaintiff need not be characterized as "arbitrary and defiant," for we think that discontinuing the two trains without approval of the Public Service Commission was no more than an honest mistake, based upon the plaintiff's plausible, but unsound, reasoning.

Upon the hearing it was made manifest to the court that the Alabama authorities would take action against the plaintiff and its agents—indeed, it may be that they are in duty bound so to do—under the provisions of the statutes hereinbefore recited, and for that reason the plaintiff now asks for interlocutory injunction.

It is not to be assumed that the Commission, clothed with administrative authority and with quasi legislative and judicial power, will exceed law and justice by exacting of the plaintiff a public service not reasonably balanced by a fair return, if such balancing of the public good with the expense entailed upon the plaintiff is practicable, and of benefit to a considerable number of people, and not unduly onerous upon the plaintiff, taking into consideration all the facts and circumstances of and incident to the case. The pertinent observation of current history may be here indulged that the Public Service Commission has recently in several cases, in some material particulars, at least,

P.U.R.1928E.

analogous to this case, permitted railroad companies to discontinue the service of certain local trains, where they were operating at a material loss, because facts and circumstances had arisen, such as the loss of passenger patronage, where the public has largely resorted to travel by motor busses and automobiles, induced by relative happenings such as improved roads, largely encouraging vehicular traffic. The plaintiff has not submitted a case of obvious interference with interstate commerce, or one which, as it now stands, justifies a preliminary injunction; and we hold that the plaintiff should have made its application to the Alabama Public Service Commission for the discontinuance of the two trains.

It is to be remembered that the Congress could not hear, fairly consider, and adjust the intricate matters of passenger and freight rates; so the Interstate Commerce Commission was created, and vested with ample regulatory and administrative powers over passenger and freight traffic between the states. Of course, the law of Congress in that field is paramount, and harmonizes with the purpose of the commerce clause. So, likewise, when it was apparent that the state Legislatures could not adequately deal with intrastate problems arising under attempts to regulate the passenger and freight rates within the states, and cognate things, such as the discontinuance of trains, compelling the erection of suitable passenger station buildings, etc., the states created Public Service Commissions, with appropriate authority under the police power reserved to them. The usefulness of such Public Service Commissions is not to be unduly hampered, or even interfered with, except where lawful power is exceeded, or sound discretion is abused, by unreasonable and unjust rulings and orders. Mindful of the wisdom of such enactments, the Federal Courts have sedulously recognized the benefits of such Commissions; and the proper rules and orders of such Commissions—the Interstate Commerce Commission and the State Commissions as well—have been upheld. The courts have not interposed, except where the law has been transcended, or power and discretion abused. It would be a waste of space to collate the numerous cases upholding, and those disapproving, the acts of such Commissions.

P.U.R.1928E.

If the observations just made be banal, let the reader turn to the article "Public Service Commissions," in July, 1928, American Bar Association Journal, p. 359, by Hon. William D. Guthrie, where his learned and illuminating discussion lifts the subject out of the hackneyed class. Of course, one need not agree with all that is said in the able critique.

[6] Now, going on, the Alabama law requiring the regulating body of the state to be advised of a proposed change seriously affecting transportation conditions, and here to some small extent affecting interstate commerce, is well within the police power of the state, and is to be exercised for the benefit of the traveling public, with due regard to the rights of the plaintiff to be free from serious loss, in its nature confiscatory, by the operation of any public service.

However, the development of the law by adjudications and the attitude of the courts in regard to controversies like the one before us is aptly shown in cases lately decided by the Supreme Court of the United States. From Lawrence v. St. Louis-S. F. R. Co. 274 U. S. 588, 71 L. ed. 1219, P.U.R.1927D, 781, 786, 787, 47 Sup. Ct. Rep. 720, these apposite words are taken:

"We have no occasion to determine whether the Oklahoma act is obnoxious to the Federal Constitution. But, as bearing upon the propriety of issuing the temporary injunction, the fact is important that the controversy concerns the respective powers of the nation and of the states over railroads engaged in interstate commerce. Such railroads are subject to regulation by both the state and the United States. The delimitation of the respective powers of the two governments requires often nice adjustments. The Federal power is paramount. But public interest demands that, whenever possible, conflict between the two authorities and irritation be avoided. To this end it is important that the Federal power be not exerted unnecessarily, hastily, or harshly. It is important, also, that the demands of comity and courtesy, as well as of the law, be deferred to."

The language quoted evidences the animating spirit of the Federal Courts. Compare Henderson Water Co. v. Corporation Commission, 269 U. S. 278, 70 L. ed. 273, where the P.U.R.1928E.

court at page 280, P.U.R.1926B, 666, 668 (46 Sup. Ct. Rep. 112, 113), Mr. Chief Justice Taft speaking, said:

"The district court puts refusal to grant the injunction in the present case on the ground that the complainant had not sufficiently exhausted its remedies before the Corporation Commission. We think the district court was entirely right in this."

Plaintiff alleges that the passenger train service now furnished to the railroad stations hereinbefore mentioned is reasonably adequate; but, as has been indicated, we are not so convinced, in view of the defendants' denial of that proposition. But it seems to be probable, under all the facts and circumstances of the case, that such assertion by the plaintiff may be true. However, there ought to be a ruling by the Commission, after full and fair investigation, which should lead to a just ascertainment.

Of course, the cause will remain before this court until the proper time comes for further action; in its present status it cannot be finally disposed of. Whatever course the plaintiff may pursue or the defendants take, the case must await for such further action or determination as developments may render requisite.

Accordingly, appropriate order is entered, and interlocutory injunction is denied.

Foster, Circuit Judge, and Ervin, District Judge, concur.

COLORADO PUBLIC UTILITIES COMMISSION.

RE EXHIBITORS FILM DELIVERY & SERVICE COMPANY.

[Application No. 1009, Decision No. 1865.]

Public utilities — Common carriers — Film express.

A motor vehicle operator indiscriminately serving the whole film exhibiting public and delivering exchange motion picture films between the various theaters in different communities was held to be a common carrier within the meaning of a law requiring certificates of public convenience and necessity for common carrier operation by motor.

[August 7, 1928.]

P.U.R.1928E.

APPLICATION of a motor operator engaged in the delivery of motion picture films for a certificate of convenience and necessity; applicant ordered to cease operation pending the determination of the application.

Appearances: Duke W. Dunbar, Denver, attorney for the applicant; Erl H. Ellis, Denver, attorney for the American Railway Express Company.

By the Commission: On December 17, 1927, the Exhibitors Film Delivery & Service Company, a corporation, filed its application in which it takes the position that the service being rendered by it to motion picture or film exhibitors is not that of a common carrier or "motor vehicle carrier" as defined in the statute, but praying "that in the event the Commission determines that the proposed service will constitute that of a motor vehicle carrier, it be granted a certificate of public convenience and necessity authorizing the operation of a system of exhibitors film delivery service." An answer and protest was filed by American Railway Express Company and Colorado Motor Way, Inc. The case was set for hearing and was heard in the hearing room of the Commission on March 12, 1928. The express company alone appeared at the hearing.

When the case came on for hearing the applicant asked the Commission in the event that it should decide that the service being rendered by it is that of a common carrier, it should not pass upon the question of public convenience and necessity or issue a certificate of any kind. Briefs have been filed by both the applicant and the express company. The latter takes the position that while it really does not object to the Commission expressing itself on the question, it is not within the power of the Commission to render declaratory judgments or decisions and that from a legal and practical viewpoint the hearing is upon a moot question. This position would be well taken if the applicant were not already operating. If it is operating as a common carrier, it is the duty of the Commission to order it to cease and desist from such operation, because it has and wants no certificate therefor. Therefore, it is the duty of the Com-

P.U.R.1928E.

mission to determine whether or not the applicant is operating in the state of Colorado as a common carrier.

The application states that the stock in the applicant is owned by men who have been in the film delivery service in and near Kansas City for a period of ten years and have increased their business to such an extent "that they are now operating 8 trucks out of Kansas City." Pursuant to their determination to extend their business into new fields they organized a Colorado company, which is the applicant. Their certificate of incorporation, a copy of which was filed with the Commission, states:

"The object for which our said company is formed and incorporated is for the purpose of: to gather, receive, transport, distribute, and deliver motion picture films and other goods and merchandise of whatsoever kind and nature, and to carry on a general transportation, freight and express business to and from all points and places, either in or out of this state, where it may seem advantageous and profitable to carry on such business, and to own and operate a line or lines of motor vehicles and trucks for such transportation, and to that end to own, lease, and operate cars and vehicles of whatsoever nature and description.
. . ."

The applicant has one truck leaving Denver daily at about 9 P. M. passing through the towns of Brighton, Fort Lupton, Platteville, Greeley, Eaton, Ault, Nunn, and Cheyenne, returning by way of and through Wellington, Fort Collins, Loveland, Berthoud, Longmont, and Boulder. It has another truck leaving Denver and passing through Colorado Springs, terminating its trip in Pueblo. Under separate written contracts with the exhibitors, it picks up motion picture films at the various Denver offices of the distributors and delivers them in the motion picture houses in each and all of the towns and cities named. At the time of delivering the films it picks up those already used and ready for return to the distributors or to other exhibitors, as directed by the distributors. The charge for these services is 5 or 6 cents a reel depending upon the distance of the exhibitor from Denver. The exhibitors pay for the transportation both from and to the distributors.

The evidence shows that the applicant serves all of the motion
P.U.R.1928E. , 40

picture houses or exhibitors, except one, in the towns and cities into and through which it operates. It is very willing to serve the one house not now being served and any others who may come into the field.

The applicant contends that it is not a common carrier. The express company contends that it is. At the time of the hearing we were of the opinion that the applicant is a common carrier and another review of the authorities and a reading of the briefs filed, have convinced us that it is such a carrier without any substantial doubt. The term "motor vehicle carrier" applies to one "serving the public in the business of transporting persons or property for compensation over any public highway between fixed points or over established routes, or otherwise, who indiscriminately accept, discharge, and lay down either passengers, freight, or express, or who hold themselves out for such purpose by advertising or otherwise."

In order that a carrier be a common carrier it is not necessary that he serve the whole public. No common carrier does. In Terminal Taxicab Co. v. Kutz, 241 U. S. 252, 60 L. ed. 984, P.U.R.1916D, .972, 974, 36 Sup. Ct. Rep. 583, Ann. Cas. 1916D, 765, it appears that the company was "under contracts with hotels by which it agrees to furnish enough taxicabs and automobiles within certain hours reasonably to meet the needs of the hotel, receiving the exclusive right to solicit in and about the hotel, but limiting its service to guests of the hotel." The court speaking through Mr. Justice Holmes held: "We do not perceive that this limitation removes the public character of the service, or takes it out of the definition in the act. No carrier serves all the public. His customers are limited by place, requirements, ability to pay, and other facts. But the public generally is free to go to hotels if it can afford to, as it is free to travel by rail, and through the hotel door to call on the plaintiff for a taxicab. . . . The service affects so considerable a fraction of the public that it is public in the same sense in which any other may be called so. German Alliance Insurance Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, 34 Sup. Ct. Rep. 612, L.R.A.1915C, 1189. The public does not mean everybody all of the time." This case was cited and quoted from with P.U.R.1928E.

approval in *Davis v. People ex rel. Public Utilities Commission*, 79 Colo. 642, 644, P.U.R.1926E, 635, 247 Pac. 801.

In the case we have here the applicant is indiscriminately serving the whole film exhibitor public with the exception of one exhibitor whom it obviously is very desirous of serving. It is true that it may not be advertising. There is no need therefor. If it is indiscriminately accepting, discharging and laying down express, advertisement is unnecessary. It is generally conceded not only in Colorado but elsewhere, that in order for an operator to be a common carrier he does not need to haul all sorts of freight or express. Some operators confine themselves to the moving of furniture, others to livestock, still others to milk and cream. As is stated in *Campbell v. A. B. C. Storage & Van Co.* 187 Mo. App. 565, 571, 572, 174 S. W. 140: "It is not necessary that he (a common carrier) carry all kinds of goods. If he professes to carry only a certain kind, this does not take from him his status as a common carrier. . . ."

In a few isolated cases there is found language indicating that one who operates under private contracts is not a common carrier. An examination of all the authorities, however, leads one irresistibly to the conclusion that in determining whether or not a given operator is a common carrier, the test is not whether he has separate written or other kind of formal contracts with each and every one of his customers. On the contrary, the test is whether he is serving a sufficiently large portion of the public in the carrying of those kinds of goods which he accepts. As is stated in the *Campbell case, supra*, "For if the defendant, by reason of the circumstances, is a common carrier as to the goods in question, it cannot by any special contract change its status as such or exempt itself from the responsibilities growing out of that relationship." It is true that once it is determined that a carrier is a common carrier the law steps in and imposes upon him the duty of making uniform rates and rendering equal service to all persons, but the fact that the law imposes upon a common carrier such a duty has nothing whatever to do with the test as to whether he is a common carrier.

In the *Davis case (supra)*, it appeared that the operator was serving 121 members under a contract with a so-called merchants P.U.R.1928E.

and manufacturing association which was organized for the sole purpose of evading the law, as Davis had been denied a certificate by this Commission. In one case an operator in Greeley had picked out seventy-five of the leading merchants and business men in that city and made separate written contracts with each and all of them. He then contended he was a "contract" carrier. The question is not whether he is a "contract" carrier. It is whether he is a common or private carrier. If an operator serving 75 business men without any formal written contracts is a common carrier, the making of such contracts does not make him a private carrier.

It is quite true, as has been held in a number of cases, including those decided by the Supreme Court of the United States, that a private carrier cannot lawfully be converted into a common carrier against his will, but it is equally as clear that a common carrier is such by reason of what he does in spite of what he says about himself.

A few cases bearing on the questions involved here might be mentioned. In Smitherman & McDonald v. Mansfield Hardwood Lumber Co. 6 F. (2d) 29, P.U.R.1926A, 71, it appears that the lumber company extended its private railroad line some three miles to carry oil for one party who for awhile was the only shipper. Later it made contracts with four other shippers of oil and held itself willing and ready to haul oil and oil supplies for any others under private contract, although it professed not to be a common carrier. It was held to be a common carrier of oil and oil equipment.

Western Maryland Dairy, Inc., concluded to transport to its depot milk which it purchased from certain farmers. It bought out certain individuals and companies who had been transporting the milk and thereafter carried the milk on its routes to its plant in its own trucks. The farmers were charged for the transportation, in some cases more and in others less, than they had paid before. The transportation charge was somewhat camouflaged and referred to as a "differential." The milk was bought "f. o. b. Baltimore." The Maryland court of appeals, in West v. Western Maryland Dairy Co. 150 Md. 641, P.U.R. 1927B, 524, 528, 135 Atl. 136, held that the carrier of the milk, P.U.R.1928E.

the dairy company, came within the terms of the public freight motor vehicle law of Maryland and quoted from a decision in another case in which it was stated that the "plan of operation bore evidence of being a studied attempt to reap the rewards of common carriers without incurring the corresponding liabilities."

The port of Seattle, which was operating a ferry, entered into a contract with a bus company by which the latter agreed to transport passengers going to or from the ferry. The bus company was held to be a common carrier. *State v. Ferry Line Auto Bus Co.* 93 Wash. 614, 161 Pac. 467. In *Textile Alliance v. Keahon*, 125 Misc. 400, 211 N. Y. Supp. 205, it appears that the trucker had a contract with the United States for the exclusive transportation of imported merchandise from the steamship docks to certain places of appraisal. The United States restricted this service to one operator and paid him his certain charges. However, the importers reimbursed the Government. The operator was held to be a common carrier.

The Pennsylvania Public Service Commission in *Wayne Transp. Co. v. Leopold*, P.U.R.1924C, 382, held that two men, both working in a mill, one owning a five-passenger car, the other a seven-passenger car, making morning trips from home to the mill and evening trips in return, carrying on these trips with them eleven other workmen who resided in the same place and were also employed at the mill, or in the town in which it was located, were common carriers. The contention of the operators in that case was much the same as that in this one. According to the Commission, "They base this contention mainly upon the allegation that they do not hold themselves out as carriers for the public at large, or for passengers indiscriminately, inasmuch as the passengers they carry are, practically speaking, the same persons every day. In effect, the contention of respondents is that their passengers are carried under private contract." The Commission continuing, said: "With this contention the Commission cannot agree. Courts and Commissions have repeatedly held that the distinction between common and private carriage *does not necessarily depend upon whether written or oral contracts have been entered into but rather upon* P.U.R.1928E.

the nature and character of the carriage or service rendered and upon actual conditions of service as disclosed by testimony." (Italics ours.) The Commission quoted from another case decided by it, one significant sentence of the quoted matter being: "There are numerous acts which tend to establish common carriage; that all of them must exist in a particular case, in order to establish common as distinguished from private carriage, is not the law."

The California Railroad Commission, which probably has done more work than any other State Commission in the field of regulation of automobile carriers, held in *Forsyth v. San Joaquin Light & P. Corp.* P.U.R.1926C, 344, that a corporation in transporting its employees and their families by auto stage on public highways between a city and its construction camps for definite fares fixed by written instructions to its labor agent and noted on employment contracts for deduction from wages, is a transportation company as defined by the Auto Stage and Truck Transportation Act of 1917.

In *Restivo v. West*, 149 Md. 30, P.U.R.1926A, 639, 642, 129 Atl. 884, the Maryland court of appeals held that an operator transporting passengers under a so-called charter agreement by which the passengers presenting themselves for transportation were said to charter the vehicle for \$30 a trip, was a common carrier. The Commission said: "It is difficult to determine with exactness just when the owner of a motor vehicle is operating as a common carrier, as that term is ordinarily understood in the law, but the courts have not been inclined to excuse the increasing number of those who earn their livelihood by transporting persons or goods for hire in motor vehicles from the responsibilities of common carriers simply on technical grounds. . . ."

A rather unusual contract for transportation is set forth in *Goldsworthy v. Maloy*, decided by the Maryland court of appeals and reported in 141 Md. 674, P.U.R.1923C, 626, 119 Atl. 693. One Goldsworthy was the owner of a large motor truck for the use of which he had a license permitting him to operate the truck for hire. (Apparently as a private carrier). One Buckell entered into a contract with Goldsworthy by which Goldsworthy P.U.R.1928E.

hired his truck "unto the party of the second part for and during a period of two weeks from the date hereof and thereafter for a like period of two weeks from time to time until either of the parties shall give the other one week's notice of his desire to discontinue the same, for the purpose of transporting such persons as the said party of the second part shall desire, from Gilmore, Allegany county, Maryland, to Barton, Allegany county, Maryland, and from Barton to Gilmore, making each working day, one trip with the said truck each way." The contract further stipulated that the trip should be made at such time in the day as to deliver the passengers in time for their daily occupations and to return with them at the termination of their day's work. The owner of the truck was to receive a stated amount for every trip and so much per passenger for all passengers in excess of a certain number. The State Public Service Commission secured an injunction which, on appeal, was sustained. The Maryland court in the course of its opinion said: "If it be held that an owner of a motor vehicle can thus relieve himself of complying with the requirement of the law, to obtain a permit from the Public Service Commission, and from being placed in the class of common carriers, it will furnish an easy way to evade the law. If Goldsworthy can say, 'I am not a common carrier; I only carry such persons as Buckell shall desire, or such as may be designated by him,' and keep up that business for an indefinite time, of hauling from half a dozen to twenty or more persons every trip, without being amenable to the law as a common carrier, it would be useless to pass such statutes as we have on the subject." (At p. 632.) The court further stated in a concluding paragraph of its opinion: "The owners certainly should not too readily be permitted to enter into contracts or adopt measures which will enable them to readily evade the letter or the spirit of the statutes intended to govern them." (At p. 634.)

While in the case before us the revenue that would be received by the state from the operation in question of the applicant would be comparatively small, we see no reason, why if a carrier transporting films for all of the exhibitors except one in its territory and standing ready to serve that one and all other persons as P.U.R.1928E.

they come into the field, is not a common carrier, a carrier hauling groceries to all of the merchants in a large area of the state might not also operate as a private carrier. The same would be true of those now hauling livestock, milk, and cream and other special commodities under certificates issued by this Commission. Thus the purpose of the statute would largely be defeated.

It is doubtless true that in this case the operator renders some personal service in connection with its transportation. The same is true of many other common carriers, including the express company, protestant herein. Such special services are a matter to be governed by tariff provisions and rules and regulations which are required by this Commission to be filed with it by all common or motor vehicle carriers.

Of all the cases cited by the applicant only one appears to be in point although we do not agree with a statement found in another case. The one case in point is identical with the case here. The Federal District Court for the Eastern District of Michigan, Southern Division, held in *Film Transport Co. v. Michigan Pub. Utilities Commission*, 17 F. (2d) 857, that an operator serving 150 theatres in the southern part of the state under separate contracts is not a common carrier. The exhibitors served appeared probably to be the greater part of those in the given territory. The language of the court being: ". . . the plaintiff is serving a large class of shippers though perhaps not all of the individuals in the class shipping in a given territory." (At p. 858.) The opinion in the case is rather short and is apparently based upon a total misconception of the decision rendered by the Supreme Court of the United States in *Michigan Pub. Utilities Commission v. Duke*, 266 U. S. 570, 69 L. ed. 445, P.U.R.1925C, 231, 233, 45 Sup. Ct. Rep. 191, 36 A.L.R. 1105. The Court said in the Film Transport Case, *supra*: "The test, however, applied to the transportation company in the Duke case . . . when applied to the plaintiff in this case leads inevitably to the same conclusion." (At p. 858.) One looks in vain for any suggestion in the Duke case which could conceivably require such a decision as was made in the Film Transport case. In the Duke case it appeared that the operator was serving three customers. The language of the court being: "His P.U.R.1928E.

sole business . . . is limited to the transportation covered by his three contracts." The three customers were shipping their own products only. There is no suggestion in the Duke case that one who otherwise would be a common carrier could, by the simple expedient of making some formal written contracts, withdraw himself from that class. The important point in the Duke case obviously is that the carrier was serving only three customers, not that he had written contracts or any contracts at all.

In Hissem v. Guran, 112 Ohio St. 59, P.U.R.1925C, 695, 696, 697, 699, 146 N. E. 808, it appears that Guran and Myers were "under a contract of employment with a branch of the Summit County Milk Producers Association, whereby they were employed for hire to collect and transport milk and cream of the members of the said association, and no one else, to the White Rock Dairy Company of Akron, and no other person, upon a regular schedule of prices, depending upon the distance and the character of the highways covered. . . ." It does not appear who paid the transportation charges or whether the milk was bought f. o. b. the milk dairy's depot or to the farmer's gate although there is found this language in the opinion: "Guran and Myers do not serve the public generally, or any person or firm other than members of the association, in accordance with the contract." The court made this statement in the course of its opinion: "The authorities are equally uniform in holding that, if a carrier is employed by one or a definite number of persons by a special contract . . . he is only a private carrier." This is the statement with which, as we stated above, we cannot agree because without question, taken literally, it is wholly out of line with the authorities in the country bearing on the point. If this were the law, one carrier might conceivably haul for 500 or 1000 or more farmers provided each and all of them made a separate contract or that all had the dairy company make the contract for them. In this state we not only have common carriers hauling milk for the farmers under certificates from the Commission, but we have private carriers hauling for one dairy company the milk which it purchases delivered to the dairy at the farmer's gate. Where the carrier hauls for a large number P.U.R.1928E.

of farmers, whether under special contracts or otherwise and they pay the freight, he is a common carrier. When he is employed by the dairy company to collect and haul for it, milk which is delivered to the dairy at the farmers' gates, he is a private carrier.

After careful consideration of the evidence the Commission is of the opinion and so finds that the operation now being conducted by the applicant, The Exhibitors Film Delivery & Service Company is that of a common carrier and that not having and not asking for a certificate therefor, either for intrastate or interstate business, it should be ordered to cease and desist from said operation.

Of course, we are not called upon to express any opinion as to the public convenience and necessity for such operation as the applicant has expressly asked us not to do so. An expression of opinion on this question would be gratuitous and uncalled for because the case, so far as that question is concerned, is moot and the briefs of the parties do not discuss the question.

KANSAS PUBLIC SERVICE COMMISSION.

CITY OF WICHITA et al.

v.

KANSAS GAS & ELECTRIC COMPANY.

[Docket Nos. 8469, 8499.]

Rates — Reasonableness — Uniformity — City and suburban electricity.

The largest city in a closely allied group of municipalities served at a uniform reasonable rate by the same electric utility was refused a request for a special reduced rate where the difference in production and distribution cost as between such city and the aggregate consumption beyond the corporate limits thereof was not sufficient to warrant an allocation of plant to any particular class.

[June 16, 1928.]

APPLICATION of two cities for a reduced rate for electric service; denied.

P.U.R.1928E.

By the Commission: The respondent began business in Kansas in 1910 and at that time owned or controlled electric systems in only two cities, viz., Pittsburg and Wichita. These two properties had previously been held under separate ownership and the franchise under which each of said properties was operated contained a schedule of rates to be charged in these respective cities, and these rates differed each from the other, so that respondent was then charging one set of rates in Pittsburg and another set in Wichita. When the Public Utilities Commission was established in 1911 respondent, complying with the requirements of the Public Utilities Act, filed schedules of these two sets of rates with the Commission. Thereafter respondent from time to time acquired electric properties in other cities from local owners operating under franchises granted before the Public Utilities Act was passed, which franchises contained schedules of rates agreed upon by the respective grantees with the respective cities and each schedule differing from the others. As a result respondent in 1919 was furnishing electricity to Wichita, Pittsburg, Independence, Cherryvale, Newton, Arkansas City, Eldorado, and other cities in Kansas, at rates differing each from every other but fixed in each instance by agreement with each city so served. During the year of 1919 the Kansas Gas & Electric Company filed with the Public Utilities Commission a new schedule of rates for power and light which it claimed to be uniform in their application throughout the entire territory in Kansas served by it. On May 10, 1920, the Public Utilities Commission made its order establishing for the Kansas Gas & Electric Company what it deemed to be new uniform rates for each class of its consumers in Kansas.

By its application filed with this Commission the city of Wichita involves the powers of the Commission to investigate and consider the cost of serving consumers in such city by the Kansas Gas & Electric Company, the value of the property devoted to, used and useful in serving the electric consumers in the city of Wichita, the revenue derived from the sale of electricity to such consumers and the return earned on the value of property devoted to the service of the consumers in the said city.

P.U.R.1928E.

The Kansas Gas & Electric Company has a great amount of property in Kansas extending from the Missouri line to Buhler and Garden Plain. It maintains generating plants in Wichita, Newton, Pittsburg, Arkansas City, Fredonia, Neosho, Independence, and Cherryvale, all being such as are designated as stand-by plants with the exception of Wichita and Neosho stations. The Wichita property is the original property acquired by the company when it was organized in 1910. That property stood alone and had no connection with any other plant. The plant at Pittsburg was acquired in 1910 and subsequently other plants were acquired in southeastern Kansas having at the time no physical connection with the Wichita property. It also acquired plants in Newton, Eldorado, Arkansas City, and other cities near Wichita. It built transmission lines to such towns and in some instances closed the generating stations in them or maintained them as stand-by plants and the station at Wichita was enlarged to meet the additional demands placed upon it. The station at Neosho was started in 1925 and some of the plants in the southeastern part of the state were closed down when it commenced operations. The Wichita and Neosho plants have been connected by transmission lines, which have gradually extended out from the stations for the service of outlying communities, and the connection is through the outlying communities. The applicant claims that practically the entire reserve capacity is in the Wichita plant and that the outstanding proposition in the case relates to allocation of property to the service of Wichita and the cost of serving Wichita consumers. The contention of the city of Wichita is that income from the Wichita operations must be compared with the value of the property devoted to serving consumers in Wichita in determining the rate of return being earned from such operations; that the cost of service is the standard in rate making and this standard must not be departed from except under extraordinary circumstances; that a public utility must not serve customers in outlying communities at less than cost and charge consumers in other communities more than cost to regain the loss thus incurred. The position of the Kansas Gas & Electric Company is that its entire property must be considered as a whole
P.U.R.1928E.

in arriving at the rate of return earned; that the rates should be uniform over the system as to the different classes to be served regardless of their distance on the system. The reproduction cost new of all of the property of the company in the city of Wichita and its environs as found by E. B. Black, the engineer for the city, was \$6,560,438.82, not including material and supplies and working capital. The reproduction cost new of all of the property as found by engineers for the electric company was \$6,546,578. The Wichita generating station of the respondent, the Kansas Gas & Electric Company, has a capacity of 30,000 kilowatts and serves consumers both in the city of Wichita and a large territory outside of such city. The maximum demand of the city from January, 1922, to July, 1926, was 11,325 kilowatts. The company keeps at its plant a complete record of its operations, separating the demands of the system outside of Wichita from the energy demands of the city itself. Black, the engineer for the city, estimated a demand of approximately 12,250 kilowatts as the city of Wichita's proportion of the system, but finally in his estimate allowed 15,000 kilowatts or one-half the plant capacity, and the property used jointly in serving Wichita and the territory outside of Wichita was allocated on that basis. The cost of reproduction new of the property allocated by Black to the service of Wichita was \$4,751,676.13, not including working capital, material and supplies, and going value. The cost of reproduction new of property allocated to the service of Wichita by the engineers for the electrical company was \$6,054,578, not including working capital, material and supplies, and going value. The difference in value is principally due to the method of allocation of property used jointly for a service outside of, as well as in, Wichita. Witnesses Ripley and Karr allocated 26,000 kilowatts of the property of the Wichita generating station to the service of Wichita. The total capacity of the plant is 30,000 kilowatts. There are four generating units in the Wichita station as follows:

Unit No. 1	4000 kilowatt capacity
Unit No. 2	6000 kilowatt capacity
Unit No. 3	10000 kilowatt capacity
Unit No. 4	10000 kilowatt capacity

P.U.R.1928E.

The testimony of Karr and Ripley tends to show that if a part of the present plant was utilized for Wichita alone, it would be necessary to segregate units Nos. 2, 3, and 4, with a total capacity of 26,000 kilowatts for that service. Counsel for the city of Wichita claims that the maximum demand of the city has been 11,325 kilowatts and to take care of this demand more than one of the existing units would be required. If two of the present units were segregated for the use of Wichita there would be available two 10,000-kilowatt units, a total of 20,000 kilowatts or one 10,000-kilowatt unit and one 4,000-kilowatt unit, a total of 14,000 kilowatts, or one 10,000-kilowatt unit and one 6,000-kilowatt unit, a total of 16,000-kilowatt units. On this basis there is no reserve capacity or stand-by units to be used in case a unit is shut down. Therefore, in such a case, stand-by units would have to be provided. The only combination of the present units is a group consisting of units Nos. 2, 3, and 4, with a total capacity of 26,000 kilowatts. The generating station in Wichita delivers energy to Wichita and territory outside of Wichita, the maximum demand on the station being approximately evenly divided, 50 per cent to Wichita and 50 per cent outside of Wichita. Black allocated 50 per cent of the generating value to Wichita while Ripley and Karr allocated 86.66 per cent of the generating station value to Wichita. The Kansas Gas & Electric Company in accordance with a franchise granted it, had underway the construction of underground conduits in the business district of Wichita. The electric company estimated the cost of such construction to be \$978,600 and the property to be retired of the book value of \$73,000. The value of the property retired is included in the Black appraisal at \$86,400. The Black appraisal did not include the underground work. Black included material and supplies at the value of \$376,765.91, of which he allocated \$204,739 to Wichita. Ripley included \$411,824 for material and supplies which he allocated to Wichita. Black included \$275,000 going value allocated to Wichita. Ripley included \$1,090,000 going value allocated to Wichita. The total generating station expenses for the year ending June 30, 1926, were \$387,951.67. The ratio of energy delivered to the Wichita distribution system to total energy P.U.R.1928E.

delivered from said station was, during the year ending June 30, 1926, 49.91 per cent.

The city of Wichita claims that taxes have been wrongfully charged to Wichita operations; that the Wichita operations are charged with taxes on property in many counties in Kansas which have no relation to Wichita operations; that taxes charged to Wichita division during the year ending June 30, 1926, amounted to \$239,340.28, while the amount properly chargeable to Wichita division for such year should be only \$114,109.19. Distribution expenses are classified in the books of the company. Distribution expenses charged to Wichita during the year ending June 30, 1926, amounted to \$69,416.90; utilization expenses for the Wichita division for the year ending June 30, 1926, \$40,207.16. Consumers expenses for Wichita division \$71,010.43. Commercial expenses for Wichita division \$70,510.38. General and administrative expenses for Wichita division \$391,510.90; operating and general expenses \$946,846.74. The applicant claims that included in this item are expenses improperly charged to the Wichita division \$235,885.72. It is the claim of the city of Wichita that the value of the electric property in Wichita on March 1, 1910, when the Kansas Gas & Electric Company acquired it was \$460,000; that the additions to June 30, 1926 amounted to \$5,711,744.29, making the actual cost of the property in Wichita \$6,171,744.29; that it is not possible to determine from the books the cost of the property used jointly in the service of Wichita and consumers outside of Wichita, apart from the cost of the property used for the service of Wichita; that in the Black valuation 72.4 per cent of the total value of the property in Wichita is allocated to the service of Wichita; that such per cent of the historical cost amounts to \$4,468,352; that the investment devoted to the service of Wichita is as follows:—Historical cost of property devoted to the service of Wichita \$4,468,352—Material and supplies \$204,739—Working capital \$88,869—Total \$4,761,960 less depreciation based on expenditures required to produce maximum operation efficiency \$111,289 leaving as a rate base the sum of \$4,650,671.

There was but little contention regarding the cost of repro-

P.U.R.1928E.

duction new of the property in Wichita in being at the time of the estimates. There is only \$14,000 difference between the value shown by the respective witnesses for the city and the electric company. But there is earnest controversy of the items over the allowance of working capital, material and supplies and going value. Mr. Montgomery, an accountant, testifying for the city, calculates rate of return from Wichita operations, submitted two tables: the first one takes no account of the new underground distributing system; the second one included the new underground distribution in the rate base. He uses the allocation of property to Wichita made by Black & Veatch and a depreciation estimate made by Mr. Black, which the respondent claims is entirely theoretical and should not be used in determining the rate base. Mr. Montgomery omits any cash working capital. The Black & Veatch valuation covers the property comprising the Wichita system. Black & Veatch evidently meant to accept the books of the respondent as of June 30, 1926, for the item of materials and supplies, according to which the total should be \$411,823.80. The total as reported by Black & Veatch is \$276,765.91. The respondent attempts to explain the difference by suggesting that Black and Veatch inadvertently used an item of merchandise stores in place of an item of general distribution stores, the difference being \$35,057.89. Mr. Black, in estimating the cost of reproduction of the Wichita property allocated a capacity of 15,000 kilowatts to the power station in Wichita and deducted one-half of the total generating station investment as valued by him. One-half of the generating station together with some other equipment deducted amounts to \$1,808,763, but intimates that reserve capacity would be needed to allow for maintenance and work upon generating units, and thought that for this purpose inter-connection with the transmission system would be of advantage to Wichita. His property value included nothing for transmission system in order to utilize the general system in an emergency. Mr. Ripley and Mr. Karr, witnesses for the respondent, testified that if Wichita were isolated from the transmission system the capacity in the present generating station necessary to give adequate and reliable service to Wichita would consist of the two large units
P.U.R.1928E.

and one of the two small units; that the 4,000 kilowatt unit would, from a capacity standpoint, answer the requirements as well as the 6,000 kilowatt unit for the hypothetical case since it is newer and more efficient and operates at a lower cost. The evidence of Mr. Karr tended to show that installed capacity must be greater than working capacity by the capacity of one of the largest units; that an installed capacity of two 10,000 kilowatt units and one 6,000 kilowatt unit, or a total of 26,000 kilowatt units, the reliable service capacity consists of one 10,000 kilowatt units and one 6,000 kilowatt units or a total of 16,000 kilowatt units. Mr. Ripley would not, therefore, in determining the value of the Wichita segregated property, estimate the value of a 4,000 kilowatt unit or \$492,000 as representing the only part of the present generating station investment not necessary to serve Wichita adequately. Mr. Black deducted one-half the fuel oil and one-half the power plant supplies. Mr. Ripley includes all the oil and all the plant supplies. Mr. Black estimates the going value at \$275,000. Professor Riggs testified he regarded this allowance for the Wichita property as fair. Frank Silliman, a witness for the respondent, estimated the going value of the entire system as being \$3,000,000. Mr. Ripley based going value upon Mr. Silliman's testimony and allocated to Wichita part of it in the ratio of the total operating revenue derived from the system, such sum so allocated being \$1,090,000. The estimate of the city's witnesses allowed nothing for working capital. Mr. Ripley included such working capital, exclusive of material and supplies, in his estimate of \$629,576 for the entire property and allotted to Wichita a part of it in the ratio of the total operating revenue derived from the entire operating system, the sum thus allotted to Wichita being \$229,000.

Black & Veatch seems to have treated depreciation in two ways. One method was to compare it with an identical new property. Under this method the depreciation would, in the opinion of Mr. Black, be \$623,891. The other is to estimate depreciation on the basis of expenditures necessary to bring the property to a maximum operating efficiency. Using this method, the amount would be \$111,289. Professor Riggs stated that as he saw the property in Wichita it was in fine condition and that

a careful inspection would probably not show more than $1\frac{1}{2}$ or $2\frac{1}{2}$ per cent that would need replacement. Black & Veatch estimated the value of the new underground construction at Wichita at \$892,000. Mr. Ripley estimated it at \$908,000. From the above figures the resulting rate basis for Wichita are, according to evidence of Mr. Ripley, for the electric company \$8,694,102 and according to the evidence of Black & Veatch and Montgomery \$6,012,326. Mr. Montgomery bases his figures of \$1,596,779 total operating revenue upon respondent's books deducting from the total revenue of the Wichita division revenue received from the interurban railway and from the small outlying towns and net profit from merchandise sales. There is no controversy on this item, nor is there any difference over the item of operating expenses as reported.

Mr. Montgomery's estimate of generating station expenses for the year ending June 30, 1926, is \$110,565. Respondent claims that in this calculation he took no account of many technical factors which affect production cost. Mr. Karr's calculation with reference to this item is as follows: Cost of supplying Wichita distribution alone from the most efficient part of Wichita generating station assuming gas fuel \$258,987; adjustment in general expenses for the hypothetical case of Wichita isolated \$45,825.

Mr. Montgomery in his deduction for tax adjustment calculates that for the year ending June 30, 1926, the taxes chargeable to Wichita should be \$125,321 less than the taxes allowed the Wichita district in the company's books. The respondent does not admit the method of tax allocation was improper or incorrect, but for the purpose of the hypothetical study of Wichita as an isolated system prepared a calculation based on the city's theory under which it claims a reduction of \$78,027 should be the limit.

Subtracting adjusted operating expense from adjusted operating revenue gives adjusted net operating revenue according to Montgomery \$885,818 and according to Ripley \$773,784. Respondent offered in evidence two valuations of its entire system, under which the bare physical system was valued at \$20,206,973. The working capital for the entire system as fixed by Ripley P.U.R.1928E.

\$1,193,211. As to going concern value Professor Riggs testified that courts have allowed from two to ten per cent of bare physical value for going concern value and Mr. Silliman placed the going concern value of the entire system \$3,000,000. Mr. Montgomery estimated the historical cost of the entire property to be \$19,131,228.95. Mr. Ripley testified that of the total bare physical value over 97 per cent was taken directly from the company's books showing net additions to property.

As to operating revenue Mr. Montgomery uses figures found in respondent's books \$1,750,883. Mr. Ripley claimed the operating expenses for the whole system to be \$2,634,923. Mr. Montgomery estimated 1 per cent of the book value to be sufficient to provide for retirement reserve. According to exhibits introduced by Mr. Ripley for the first eleven years the transfers were less than 1 per cent and for the past six years the average expense has been in excess of 1 per cent. Professor Riggs stated that the company's reserve was, in his opinion, proper and reasonable. The city presented no evidence upon rate of return on the value of the entire system but Mr. Montgomery submitted a table showing an estimated rate of return upon the historical value as a whole. The rate base did not include anything for going concern value or working capital. Mr. Ripley submitted a calculation showing rate base June 30, 1926, as previously derived based upon the reproduction value of the property and showing actual net operating revenue for twelve months ending June 30, 1926, both in total and in per cent of rate base. Before deduction for retirement reserve this amounted to 6.95 per cent and the rate of return after transfer of \$300,000 to retirement reserve was 5.77 per cent. Mr. Ripley submitted a similar calculation showing his estimate for the year 1927. Before deduction for retirement reserve the net income can be estimated at 7.33 per cent of 1917 rate base and the rate of return after allowing \$450,000 for reserve is 5.62 per cent. It was, therefore, claimed by the respondent that the company did not earn during the year 1926 and could not earn during the year 1927 a fair rate of return upon a fair value of the entire property.

Mr. Montgomery testified that respondent's surplus on June
P.U.R.1928E.

30, 1926, was \$906,952.39, that in 1920 it was down to \$55,000 and had been gradually accumulating ever since. The respondent claims that in this computation he made no deduction for earnings for bond discount nor for property not yet bonded and that his provision for retirement reserve was not in accord with the actual amount set aside by the company for that purpose; that his evidence showed that respondent had never paid over 8 per cent dividends on its common stock; that for the past four years it had paid 8 per cent per annum but that prior to that time it had paid from 1 per cent to 6 per cent per annum.

The respondent claims that for purpose of comparison it has divided its system into six districts and it keeps an account with each district upon its books; that this system of bookkeeping is simply for the convenience of the company and in no wise affects the rates for the different districts; that the rates charged are uniform for each class of business throughout the entire system; that so long as the system is operated as a whole and the rates are uniform it makes no difference to Wichita consumers how the taxes are allocated to the different districts; that it would not change the rate at Wichita if all of the taxes for the entire system were charged against the Wichita district on the books of the company. Mr. Ripley testified that he believed that each district is paying the cost of service in that district. The franchise granted the respondent by the city of Wichita contains the following provisions:

"The grantee shall, not later than the first day of July, 1922, set up a separate account on its books of the capital investment used and useful in and maintained by it for the purpose of supplying electric service to its consumers served from grantees 'Wichita electric distributing system,' and shall keep said accounts separate from all other accounts and shall keep separately the operating costs, expenses and receipts for and from said 'Wichita electric distributing system.'

"Said capital account shall also separately note and allocate the amount of capital used in supplying any and all other public utilities or utility concerns in the city of Wichita."

The contention of the city of Wichita is that the income from Wichita operations must be compared with the value of the P.U.R.1928E.

property devoted to serving its customers in Wichita and that this would be in accord with the contract between the city and the electric company. To sustain its contention that the rates should be based on the property as a whole instead of the theory of segregated units, the respondent relies principally on the testimony of Mr. Ripley, Mr. Silliman and Mr. Karr and what it deems to be corroborating testimony of Professor Riggs, all of which it claims to justify its claim.

There is only \$14,000 difference between the witnesses for the city and those for the company as to the physical value of the property in Wichita as if isolated. Materials and supplies Black & Veatch estimate at \$376,766, the respondent's witnesses at \$411,824. The item of property not required to serve Wichita if isolated was fixed by the city's witnesses at \$1,808,763, and by the company's witnesses at \$492,000. The going concern value, the city's witnesses fixed at \$275,000 while the company's witnesses gave their estimate as \$1,090,000. The estimates of the company's witnesses as to working capital other than supplies was \$229,000, the city's witnesses making no allowance for this item. The city's witnesses allowed \$110,289 for depreciation, the company's witnesses allowing nothing for this item. New underground distribution was by company's witnesses fixed at \$908,700, the city's witnesses allowed \$892,200 for this item. The rate base, according to the company's witnesses was found to be \$8,694,102 and by the city's witnesses \$6,012,326. The total operating revenue was found without controversy to be \$1,598,779. Operating expenses were found to be \$946,847 from which the company claims should be deducted \$45,825 for generating station expense adjustment, while the other witnesses claimed that the deductions should be in the sum of \$110,565. The witnesses for the city claimed that \$125,321 should be deducted for tax adjustment, while the company's witnesses claimed that \$78,027 should be the proper amount to be deducted. The adjusted operating expense, according to the company's witnesses was \$822,996 and the city's witnesses estimated such expense at \$710,961. The adjusted net operating revenue was found to be by the company's witnesses \$773,784 and by the city's witnesses \$885,618. The adjusted net revenue in per cent of rate P.U.R.1928E.

base before deduction for retirement reserve was, by the company's witnesses found to be 8.90 per cent and by the city's witnesses 14.73 per cent.

The Neosho plant has not been furnishing energy to Wichita. The bulk of the reserve capacity is in the Wichita plant.

The Commission finds that of the disputed items the value of materials and supplies should be fixed at \$411,824. Total physical value \$6,958,400. Property not required to serve Wichita if isolated \$1,309,311 and the amounts of other disputed items should be found to be as follows:

1. Total bare physical value June 30, 1926	\$6,546,578.00
2. Materials and supplies	411,824.00
3. Total physical value	\$6,958,402.00
4. Less property not required to serve Wichita if isolated	1,309,311.00
5.	\$5,649,091.00
6. Less materials and supplies not required for Wichita service	172,027.00
7.	\$5,477,064.00
8. Going concern value	500,000.00
9. Working capital other than supplies	229,000.00
10.	\$6,206,064.00
11. Less depreciation	111,289.00
12.	\$6,094,775.00
13. New underground distribution—net	908,700.00
14. Rate base	\$7,003,475.00
15. Adjusted total operating revenue	\$1,596,779.00
16. Operating expenses as reported	946,847.00
17. Less generating station expense adjustment	45,825.00
18.	\$901,022.00
19. Less tax adjustment	125,321.00
20. Adjusted operating expense	\$775,701.00
21. Adjusted net operating revenue	\$821,078.00
Before deduction for retirement reserve, adjusted net revenue, per cent of rate basis	11.72%

As stated in the brief of counsel for the city the case of the city was prepared upon the basis that there is in the city of Wichita certain property which serves the inhabitants of such city and that it is upon that property alone which the company is entitled to earn a fair rate. There is no claim that the com-

P.U.R.1928E.

pany was receiving more than a reasonable return on the combined property. As stated in the brief "the figures of the utility tend to show that it is only receiving a reasonable return on the combined property. As stated above, the city has not attempted to prove to the contrary, and on the evidence introduced if this Commission finds that the entire property should be treated as a unit, then the reduction of rates should not be granted, or the city should be permitted to make a survey of the entire properties in order to determine whether the figures given by the utility are correct."

Counsel for the city contends that by the terms of the franchise ordinance granted by the city of Wichita, it was provided that the respondent should set up in its books as a separate valuation the property used and useful in the city of Wichita and that the rates should be determined thereon, but that regardless of such ordinance the weight of authority is that the properties should be treated as separate units and cites:

Municipal Gas Co. v. Sherman (Tex.) P.U.R.1925E, 67, 70, in which it was said:

"It would be manifestly unfair and unlawful to add to the cost of gas to the consumers of any city, to overcome the deficit of another; or putting it another way, to tax all the consumers of all the separate plants a rate that would yield a return upon the whole, while one or more of the individual units failed to yield a fair return, merely because the same company owned and operated the several plants as separate and distinct units."

The above was a gas case. The company was a private corporation engaged in the distribution of natural gas to a number of towns in Texas, the city of Sherman being among the number. It produced no gas but bought its supplies from a furnishing company receiving it as the city limits and distributing it through its own line to its customers. The Commission said that in such a case it would be unlawful and unfair to add the cost of gas to the consumer of one city to overcome the deficit of another.

In the case of Buck v. International R. Co. P.U.R.1925D, 782, 788, the New York Commission said:

"We know of no reason why car riders in Buffalo should P.U.R.1928E.

be required to make up deficits in operations in other municipalities or in summer resorts or parks."

In this case over 68 per cent of the company's property was located and used in Buffalo and its remaining property was devoted to interurban and local service outside including a part in Canada. The company was operating a Canada division over which the Commission said it had no control. In *Fargo v. Union Light, Heat & P. Co. (N. D.) P.U.R.1920A, 764*, where the system was in both North Dakota and Minnesota, it was held that consumers in North Dakota should not be required to pay a return on the value of utility property in excess of the amount thereof properly chargeable and assignable to the service within the state.

In the case of *Re Eaton Rapids (Mich.) P.U.R.1922D, 94*, it was held that rates for gas by a public utility rendering service in two cities from a single plant should be based upon the amount of gas consumed in each city instead of attempting to definitely segregate the property used in the service of the city.

In Re Acquackanonk Water Co. XI N. J. P. U. C. R. 11, P.U.R.1923D, 60 the relative corporate ownership in the jointly used facilities of related water utilities was not allowed to govern in the determination of rates, but the value of the property was determined in the aggregate and then allocated in proportion to the service supplied to each municipality, the rates being determined upon the basis of cost of supplying the various municipalities served.

The case of *Bridgeport v. Connecticut Co. (Conn.) P.U.R. 1922A, 95*, was a street car case in which the utility covered nearly the entire state, evidently with lines running to remote sections. The company, for convenience, divided the state into different districts. The Commission held that the division into districts was correct and that each such district should be self supporting and allow the company a fair return on the value of the plant and equipment therein located and used, and that the rates for fare for such district should be so adjusted as to afford such return, irrespective of what rate of fare may be in other districts.

Counsel for the city of Wichita in their brief say that the *P.U.R.1928E*.

testimony is clear, that no district outside of the Wichita district is making a return upon the investment. There is evidence that the rates now in effect were insufficient to pay the cost of a service on the transmission line built to serve certain customers in the vicinity of Coffeyville. Mr. Silliman claimed, however, that by making a small additional investment extending the line to the Oklahoma state line, it would make the extension profitable, while Mr. Ripley testified that he believed every division of the property was paying exclusive of a return the other expenses or cost of service; that every sector was paying the cost of service.

The attorney for the city of Newton offered in evidence an article written by the vice president and general manager of the Consumers Power Company of Jackson, Michigan, stating the method by which his company serves 195 communities from central generating plants from which the following quotation is taken:

"It has long been the policy of Consumers Power Company to supply all customers of a given class under standard rates throughout the entire territory served by the company. This practice is followed regardless of the distance of the various localities from the dams or power stations, or regardless of the size of the communities served. In other words, customers of a certain class-resident, commercial lighting, etc., pay the same rate wherever they may be located on the lines of the company whenever they use the service in like manner and under like conditions. Such few exceptions as there may be to this rule are due to old local ordinances and not to action on the part of the company.

"As a practical matter, the company has found, as any one will find who investigates the matter, that it is impossible to determine what it costs to serve any given locality. It is true that there are some costs peculiar to each community. The costs incurred in connection with distributing the energy and the fixed charges on the distribution system may be allocated directly to the particular city or village.

"That the transmission lines which make possible the delivery of the energy generated by water power plants to the communities in which it is to be used should be treated to all intents
P.U.R.1928E.

and purposes as if they were part of the power plants. The power system could not exist without the market and the facilities which make it possible to reach the market, assuming that good business judgment has been exercised in their construction must in practice be regarded as part of the power system and the costs incident to transmission be regarded as part of the power costs or else there will be many instances in which the development of hydroelectric plants will be delayed awaiting the growth of a nearby market, if not prevented altogether.

"There is also a commercial element to be considered in such cases. Industries within the territory supplied from a large water power plant are often in competition with one another. Cities are in competition with each other to obtain factories. There are, of course, certain local type of industries which cannot move from city to city and in the original location of which in a given city the cost of energy has not been an important consideration but there are other industries, particularly the larger ones, not dependent on local market, which, if other things are equal, will locate where energy can be obtained most cheaply. It seems to us that rates which will not give a material competitive advantage to an industry in one city over a similar industry in another city supplied from the same source of power are proper rates if the only criticism which can be made of them is that the distance factor has been left out of consideration. Also, we believe that the development of water powers is intended to be for the general good of the people who can reasonably be served from those powers and that the market for the energy should be such that no one community will be given a great competitive advantage over others in securing industries because of its proximity to the powers."

This question has been considered by the Public Service Commissions of other states.

"It is not feasible to attempt to allocate the property invested in transmission lines serving towns or cities of similar size and character, nor between small towns and large cities, but a uniform rate in all the cities involved is fair and not unduly discriminatory." Re Missouri Gas & Electric Service Co. (Mo.) P.U.R. 1921D, 687.
P.U.R.1928E.

The case of the Missouri Public Service Commission in *Re Missouri Gas & Electric Service Co. supra*, bears such a striking similarity to the case under consideration that we deem it worthy of special mention. In that case the applicant had a steam plant located in the cities of Liberty, Lexington, and Richmond, Missouri, radiating from Richmond, the applicant has been serving the last few years several of the smaller neighboring towns by comparatively low voltage transmission lines. During the year 1920, there was constructed a transmission line connecting Lexington, Richmond, and Liberty, for the purpose of supplying all the towns interested herein electrical energy generated at Kansas City, Missouri. The receiving point is at the terminus of a line built out from Kansas City, located in the city of Liberty. At that connecting point is a substation from which the applicant has constructed a 3,300-volt transmission line extending in an eastward direction touching Missouri City, then from there in a southeastward direction it passes through Orrick, and by Fleming and Camden, Missouri, bending eastward and northward to the city of Richmond, terminating at a substation within that city. Then from that substation is constructed a 13,200-volt transmission line which extends southward; then eastward by Lexington Junction, where north of the city of Lexington the line divides going south, crossing the river through a submarine cable to Lexington, Missouri. The other branch running in a northeastward direction to Hardin. The population of the larger towns just mentioned, according to the 1910 census, is as follows: Liberty, 2800; Richmond, 3600, and Lexington, 5242. Along or near these lines the company supplies energy to several coal mines. The Commission said:

"The question naturally arises in a case of this nature as to what should be the basis of the allocation or the division of the property between the various towns interested in the case. This Commission, however, is frank to state that it does not consider it feasible to attempt to allocate the property invested in transmission lines serving towns or cities of similar size and character any more than it attempts to allocate the property invested in a distribution system used to serve commercial lighting customers and commercial power customers. Taking any one town

P.U.R.1928E.

or city in this group alone, there is no justification for building the transmission line from Kansas City, Missouri, to serve that particular town. However, taking all the towns herein together, along with the suburban business, such as the coal mines, there seems to be ample justification for the construction made." (P.U.R.1921D, at p. 689).

In Re Utah Power & Light Co. P.U.R.1921C, 294, 311, the Utah Public Utilities Commission said:

"The Utah Copper Company claimed that it should not be charged with its full proportion of the cost of this 44 kilovolt system, on the ground that it used a large block of power much nearer the terminal station than the average distance of transmission in the 44 kilovolt system, as calculated by the applicant.

"The service of this utility is a community service almost statewide in its extent. To attempt to build power rates for different localities, based upon particular investment, would entirely destroy the uniformity of rate structure, and, furthermore, would give the particular consumer all the benefits of connection to the general interconnected system so advantageous in rendering efficient service, without charging it with its proportion of the burden. Furthermore, the rate structure prescribed by the Commission in this case is based on the study of only a part, and that admittedly the most efficient and least expensive part per unit, of the applicant's system, and, as applied to the service of the Utah Copper Company or any other consumer, affords, in our judgment, a reasonable rate for the service upon any composite theory that can be devised.

"We feel, therefore, that pending full valuation and further analysis, the rates prescribed for like service should be uniform and universal in their application."

Views of the Illinois Commerce Commission on this question were expressed in Re United Utilities Co. P.U.R.1922B, 344, 345, as follows:

"The Commission is of the opinion that so far as possible the rates of an electric utility, furnishing service in a number of municipalities by transmission lines, should be uniform throughout the territory served. Inasmuch as the village of Winslow is receiving service as a part of a relatively large electric system, P.U.R.1928E.

a separate investigation of the results of service in Winslow, a comparatively small community, would serve no purpose. It appears that for the class of service now being rendered by the United Utilities Company the rates proposed herein are by comparison just and reasonable."

In the case of Trenton v. Trenton & M. County Traction Corp. decided by the New Jersey Supreme Court, 92 N. J. L. 61, P.U.R.1919B, 873, 874, 105 Atl. 136, it was contended by the city of Trenton that in determining the reasonableness of street railway rates, urban and suburban operations should be considered separately. The court in deciding against this contention said:

"It is settled that the correct legal test is the effect on the railway's entire line, and not upon that part which was formerly a part of one of the consolidating roads. St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 665, 39 L. ed. 567, 573, 15 Sup. Ct. Rep. 484. The test has recently been applied in the case of a street railway, Puget Sound Traction, Light & P. Co. v. Reynolds, 244 U. S. 574, 61 L. ed. 1325, P.U.R.1917F, 57, 37 Sup. Ct. Rep. 705. A rule which would deprive suburban communities of street railway service might be much to the advantage of great cities like Trenton, but work harm to rural communities, and perhaps be to the disadvantage of the state as a whole. There is a general public interest in having thinly populated and relatively poor sections helped by the more densely populated and richer communities. Public roads are a good illustration. We can readily picture to ourselves the state of our roads if every mile depended for its upkeep upon the revenues traceable to that mile. The law as to railways is settled adversely to prosecutor's contention."

In the case of Ben Avon Borough v. Ohio Valley Water Co. P.U.R.1917C, 390, 419, the Pennsylvania Public Service Commission, in its order fixing rates for water furnished by the water company, said:

"The cost to the Ohio Valley Water Company of delivering water to the several municipalities served by it is not the same. Water can be supplied to the south side of the river cheaper than to the north side. This is true not only on account of the addi-
P.U.R.1928E.

tional distance and the topographical conditions, but in order to reach the north side the company was obliged to construct, and must maintain, two 12-inch mains under the Ohio river, with the accompanying risks. Each succeeding borough on the north side means an increased distance, which requires not only additional expense for mains and other construction, but also additional power to supply the water thereto. . . . Taking into consideration that the water furnished by the respondent is all secured from the same source, and is supplied to the several contiguous municipalities embraced in one general district, without any great difference in cost, we have reached the conclusion that all the rates in all the districts served by respondent should be the same. There are no such substantial differences in circumstances and conditions of the service as to justify any other than uniform rates."

In the case of Glenview Improvement Club v. People's Water Co. (Cal.) P.U.R.1918F, 187, the water company was serving the cities of Oakland, Berkeley, Alameda, Piedmont, Emeryville, Albany, Richmond, and San Leandro, and also widely separated portions of the counties of Alameda and Contra Costa, outside of these communities. The rates in these various communities were not the same. The Commission ordered that the rates in these different communities be made the same. We quote from the opinion at p. 189 as follows:

"One of the questions which must be answered here is, 'Shall this water system and its service be treated as a whole, and consumers in a given class be charged the same rate regardless of location in communities?' In other words, shall all political boundary lines be disregarded and rates fixed by treating consumers the same as though they were all residents of one large community?

"This question, in my judgment, must be answered in the affirmative. I can see no reason why for a like service a consumer of this company should pay a higher or a lower rate merely because he may reside in an area surrounded by particular municipal boundaries. Therefore, the burden of cost of the service of the water as a whole to all water consumers has P.U.R.1928E.

been distributed as equitably as may be upon each class of service, regardless of the locality in which such service is given."

We quote the following from the opinion of the Illinois Public Utilities Commission, in *Re Alton Gas & E. Co. P.U.R. 1919B, 16, 20:*

"Under the particular conditions which exist at the present time there can be no doubt but that the East St. Louis Light & Power Company is securing energy more cheaply by reason of the steam station which it owns in Alton, but the fact remains that these stations have been developed by a co-ordinated scheme for power production, and naturally some portions of the system present advantages over other more antiquated portions. The question is as to whether the locality in which it has appeared best to locate the most efficient unit of such a system should receive advantage on account of this choice. This is entirely apart from the question of whether the Alton Gas & Electric Company could have financed the construction of a steam station in Alton, which, to our mind, is rather beside the issue. If the entire situation has been worked out in this combination so that an economic good is accomplished without injury to any one of the utilities, it is difficult to see where reason could be found for one party to the arrangement to receive advantage because of the mere location of a power plant which supplies the system as a whole."

The fixing of rates for cities, communities, and districts located at different points along the system has been a matter of concern with the Service Commissions in the different states. Many vexatious problems have been encountered and the difficulties are augmented with the increased demands for suburban service. It is plain that generating plants cannot be established and maintained in all separate small communities and the tendency is to connect and group them into classes and establish rates for such classes, seeking carefully for uniformity and to avoid discrimination as far as reasonably possible. By this method localities are able to receive a service which otherwise they would be unable to obtain, and the advantages thus attained redounds to the benefit of all.

The customers in a large city are more numerous and closely
P.U.R.1928E.

grouped than a like area beyond the city limits. If the city is enjoying rates reasonable and fair in the light of all the surrounding circumstances, and the utility is able to extend its service to, and connect several other smaller cities or communities, but which in the aggregate equal or exceed the number served in the larger city, or if the consumption of the generated product is approximately as great in the territory outside as it is within such larger city and the same rate is common to, and enjoyed by all the different classes within and without such city, it would in such case seem to make but little difference whether any or all the generating plants were located within or without the larger city.

Can it be that all the elements tending to the advantage and benefit flowing from the location of utilities within the cities, the increase in population, attractions and development of industries, increase in values of property and such well known aids to the expansion of the commerce and importance of a city, should be entirely ignored?

The population of Wichita now approximately 100,000 is equaled by the aggregate population of the cities and communities, a part of the general system and outside the limits of Wichita. In attempting actually or in theory to segregate the system into sections as numerous as the different communities, each with its individual surroundings, and allocate just and proper value to each of the company's property in each one of them, would tend to destroy all uniformity and probably would prove not only extremely vexatious but impracticable. If there was only one city aside from Wichita being served by the company and such city was far distant and isolated and the city of Wichita was receiving no benefit from it, and it was being served at a loss which the company was endeavoring to compel the city of Wichita to make good by imposing unreasonable rates for the service rendered in Wichita, it would present an entirely different aspect than that disclosed by the evidence in this case. Of course, the above view is predicated on the assumption that the rates in the larger cities are not, under all the circumstances, unreasonable. Captain J. H. Fletcher, engineer for the Commission, recently rendered a report in which he compared the P.U.R.1928E.

rates charged by the Kansas Gas & Electric Company with those charged by other electrical companies in this state. He found that in Wichita the tenant of a 6-room house, who uses 40 kilowatt hours a month, is charged \$2.15 per month; in Topeka the charge is \$2.80, in Salina and in Leavenworth \$3.60, in Atchison \$3.80, and in Fort Scott \$4. He reported that the schedules of the Kansas Gas & Electric Company were reasonable and recommended that other companies be asked to conform to respondent's system of charging uniform rates and speaking generally of the rates charged, he states, "Your engineer considers the Kansas Gas & Electric residential rate schedule to be the most reasonable and fair in the state."

The city of Newton seems content to rest on the showing made by the city of Wichita and from the character of the evidence submitted by its attorney seemed to favor the theory that the plant should be considered as being operated as an entire system.

**NEW YORK SUPREME COURT, APPELLATE DIVISION, FOURTH
DEPARTMENT.**

J. EDWARD CLARK

v.

UTICA GAS & ELECTRIC COMPANY.

[No. 406/13.]

(— App. Div. —, — N. Y. Supp. —.)

Service — Discontinuance — Prior indebtedness.

A public service corporation is entitled to discontinue service to a customer's present premises because of prior indebtedness of the latter at other premises, where the statute permitting such discontinuance does not limit the company's right to a particular building or premises.

[November 9, 1928.]

SUIT for penalty by utility consumer against a gas and electric company for failure to serve; order of lower court reversed on appeal.

Appearances: Richard B. Conley, Utica, for defendant-appellant; J. Herbert Gilroy, Utica, N. Y., for plaintiff-respondent.
P.U.R.1928E.

Clark, J.: This action is brought to recover a penalty under § 12 of the Transportation Corporations Law.

The defendant is a domestic corporation supplying electricity to inhabitants of the city of Utica, and on the 13th day of January, 1928, plaintiff was one of its customers receiving electric current at his premises 131 LaFayette street in that city. On or about said date defendant, without plaintiff's consent, discontinued the service at said premises, and plaintiff claims it was an unlawful proceeding, and he brings this action for the penalty prescribed by statute.

The defendant by the third paragraph of its amended answer alleges as a defense that it discontinued its electric light service to plaintiff solely because he refused and neglected to pay defendant the remuneration due for electric light service previously supplied to him.

The court on motion of plaintiff struck out this defense as being insufficient in law.

It appears by the fourth paragraph of the amended answer that between September 24, 1925, and June, 1926, defendant furnished electric light service to plaintiff at his request at his premises in Oswego street, Utica, of the value of \$44.46, for which plaintiff has refused to pay, which amount defendant alleges was due it from plaintiff when the service was discontinued at Lafayette street.

Plaintiff denies any prior indebtedness to defendant. The sole question to be determined here is whether under §§ 12 and 15 of the Transportation Corporations Law, electric service can be withheld from a customer at one location because of an unpaid bill for service rendered the same customer at another location.

Section 12 of the Transportation Corporations Law provides that:

"Upon written application of the owner or occupant of any building within 100 feet of any main . . . of a gas or electric corporation . . . on payment by him of *all money* due from him to the corporation it shall supply gas or electricity as may be required for lighting such building."

P.U.R.1928E.

And § 15 provides that:

"If any person supplied with . . . electric light by any such corporation shall neglect or refuse to pay the remuneration due for the same . . . such corporation may discontinue the supply of . . . electric light to the premises of such person."

There is nothing in the statute limiting the right to discontinue service to any particular premises. It says that a property owner is entitled to service upon payment by him of all money due from him to the corporation, and if any such person shall refuse to pay an amount due, the corporation has the right to discontinue service, but there is nothing in the statute limiting this right to any particular building or premises, and we have no right to read into the statute something that it does not contain, and which it was clearly not intended to contain. Before a person can command service from an electric light company he must pay *all money* due the corporation, and if he fails to pay, the latter may discontinue service. That is what the statute says and the meaning is perfectly clear.

Defendant concededly cut off plaintiff's supply at its LaFayette street premises. It seeks to justify that action by alleging in paragraph 3 of its amended answer that plaintiff refused to pay a just claim for prior service. The burden rests on defendant to justify its act, and the way to do it is to allege and prove the indebtedness and plaintiff's refusal to pay. Hollander v. Westchester Lighting Co. 79 Misc. 646, 140 N. Y. Supp. 544; Levine v. Brooklyn Union Gas Co. 146 App. Div. 464, 131 N. Y. Supp. 255.

The old case of People ex rel. Kennedy v. Manhattan Gas Light Co. 45 Barb. (N. Y.) 136, is authority for the proposition that if a customer of a gas or electric light company refuses to pay a just bill owing the company for service, the latter may refuse service and this right is not limited to any particular premises. If a customer owes nothing to a company and otherwise complies with the terms of the statute he is entitled to service. If there is money due from the customer to the company and he neglects and refuses to pay, the company cannot be required to furnish service.

P.U.R.1928E.

It is not important that plaintiff alleges and may as part of his case undertake to prove that he was not indebted to the company. That should not preclude defendant from alleging and attempting to prove a justification for its acts in discontinuing plaintiff's service, for the statute does not limit the right of the company to discontinue service to the particular building or premises where the default occurred.

The order so far as appealed from should be reversed on the law with \$10 costs and disbursements, and the motion denied with \$10 costs.

WASHINGTON DEPARTMENT OF PUBLIC WORKS.

**DEPARTMENT OF PUBLIC WORKS EX REL. CITY
OF FRIDAY HARBOR**

v.

FRIDAY HARBOR LIGHT & POWER COMPANY.

[No. 6155.]

Depreciation — Hydroelectric plant.

1. An allowance of 5.5 per cent was held to be reasonable for the depreciation of an electric plant, exclusive of land, p. 661.

Rates — Reduction to stimulate business.

2. A reduction of comparatively high electric rates was ordered by the Department notwithstanding an existing low rate of return, where the Department believed that the new business stimulated would so increase the gross revenue as not to lower the rate of return any further, p. 662.

[October 22, 1928.]

COMPLAINT by the Department of Public Works for the benefit of a city against alleged excessive electric rates; rates ordered to be reduced in accordance with the opinion.

By the Department: This matter came on regularly for hearing at Friday Harbor, Washington, on the 31st day of August, 1928, pursuant to notice duly given to all parties, before C. Rea Moore, Supervisor of Public Utilities, the Department being represented by R. E. Ostrander, legal assistant.

P.U.R.1928E.

DEPT. OF PUB. WKS. EX REL. FRIDAY H. v. FRIDAY, ETC. CO. 661

The parties were represented as follows: Elmon A. Geneste, City Attorney, Friday Harbor, for complainant; L. T. Mulvaney, Friday Harbor, for respondent.

Witnesses were sworn and examined, evidence was introduced, and the Department being fully advised in the premises, makes and enters the following findings of fact and order.

Findings of Fact

I

That the Friday Harbor Light & Power Company, an unincorporated company owned entirely by Mr. L. T. Mulvaney, owns, operates, and maintains an electric system for hire in the city of Friday Harbor, San Juan county, Washington, for the purpose of generating and distributing electrical energy, and is a public service company subject to the jurisdiction of the Department of Public Works of Washington.

II

That on February 20, 1928, the Department of Public Works received a formal complaint from the city council of Friday Harbor requesting that the Department hold a hearing to determine the reasonableness of the existing electric rates in that city.

III

That the Department has in this same proceeding made and entered its order fixing, as of August 31, 1928, the sum of \$33,535, as the fair value for rate-making purposes of the respondent's property used and useful in rendering electric service in Friday Harbor and vicinity, fixing as of the same date the sum of \$471 as a reasonable allowance for working capital and supplies, and making as of that date the sum of \$34,006 as the rate base upon which the respondent is entitled to earn a reasonable rate of return.

IV

[1] That a reasonable allowance for depreciation, as of August 31, 1928, is 5.5 per cent, exclusive of land.

P.U.R.1928E,

V

That the rate of return has not been excessive during 1926 and 1927, being 5.55 per cent in 1926, and 3.46 per cent in 1927.

VI

That the level of rates could be reduced with no ill effect upon the rate of return of the respondent, due to the increase of energy sales, through the extension of distribution facilities and the promotion of more extensive service to prospective customers in and around Friday Harbor. The extension of distribution facilities would mean a gradual increase in invested capital and a continual growth of the respondent's business. With proper management, the investment per customer and per dollar of gross revenue should not increase with the growth of the system over a period of time.

[2] The Department is of the opinion that a reduction in the level of rates would not mean a reduction in the rate of return to respondent, but an increase. The record shows that under the present rates respondent's patrons are using a minimum of electricity. Electricity is regarded as a luxury to be used sparingly, and homes are inadequately lighted. Electric appliances, which are regarded as household necessities in other parts of the state, are not used in Friday Harbor because of the present high rates. Several large users of electricity have installed private generating plants, which would be discontinued if respondent's rates were reduced.

Respondent can materially increase his sale of energy by extending his distribution system into the surrounding country. Several large consumers and numerous small consumers can be reached by short extensions. Respondent has the necessary generating equipment and extensions will be profitable almost at once.

VII

That the tariff schedule herein set forth will work to the benefit of both the respondent company and its customers by the nature of its inducement rates. [Schedule omitted.]

P.U.R.1928E.

VIII

A considerable amount of money could be saved both the respondent and the taxpayers of Friday Harbor by the installation of control equipment on the street lighting circuits. The street lights now burn twenty-four hours a day and not only consume about two and one half times the electricity actually required, but also burn out an excessive number of light bulbs. The record shows that control equipment can be installed on the circuit at a reasonable cost. The order will require such installation.

IX

That the accounts of the respondent have not been kept in accordance with the Department's classification of accounts, or in accordance with good accounting practice. Record of plant additions and retirements, as well as all expenses and revenues, should be accurately kept for future reference.

Note.—Depreciation.

- I. *Necessity for allowance, 663.*
- II. *Calculation, 664.*
- III. *Basis for computation:*
 - a. *In general, 665.*
 - b. *Straight-line and sinking-fund method, 665.*
- IV. *Ascertainment of accrued depreciation, 666.*
- V. *Rates for particular utility:*
 - a. *Automobile, 666.*
 - b. *Electric, 667.*
 - c. *Street railway, 667.*
 - d. *Telephone, 667.*
 - e. *Water, 669.*

I. Necessity for allowance.

The California Commission, in Re Warner, Decision No. 19507, Application No. 14266, March 21, 1928, decided from the testimony given in proceedings to revise automobile rates that the depreciation charge in previous years was in excess of the requirement by reason of the fact that certain of the automobiles had already been depreciated their total value. The Commission held that in the future no depreciation against property which has already been depreciated 100 per cent should be allowed.

While a utility is to be commended for an economical administration, it should not fail to provide for items chargeable to costs of operation. A failure to charge a reasonable depreciation leaves

P.U.R.1928E.

the company without the depreciation reserve which should have been accumulated. *Re Andover Water Co. (Me.)* F. C. 668, Sept. 4, 1926.

In *Dixfield Light & Water Co. v. Itself*, F. C. 632, Sept. 16, 1926, the Maine Commission said: "The company has failed during the past years to provide a proper annual sum for depreciation and contingencies, with the result that a sufficient depreciation reserve has not been accumulated. The apportionment of the various items which constitute the costs of operation is a managerial duty to be determined by the officers of the company who are responsible for its operation. An adequate amount for depreciation should be included."

II. Calculation.

The Illinois Commission refused to allow the depreciated cost of telephone plants to be amortized over a period of five years as asked by a telephone company, in *Re Middle States Teleph. Co. No. 17261*, May 9, 1928, stating that such expense should be taken care of by the depreciation reserve. The Commission further stated: "The contributions to the depreciation reserve take into consideration not only the normal wear and tear on the property but also take into consideration unusual happenings, obsolescence, inadequacy, and changes in the art, all of which matters are given consideration in fixing the annual rate of depreciation. Should nothing except ordinary wear and tear or action of the elements be considered the property will unquestionably have a considerable longer life than is shown by the evidence presented herein. One of the purposes of the depreciation reserve is just for such retirements as the company has been required to make and there is no reason why the company should be permitted to amortize the property to be retired as a separate item."

A telephone company which had been using a composite annual rate of depreciation of 5 per cent of the book value of depreciable property was allowed that rate rather than a claimed rate of 6 per cent, where the account for accrued depreciation would be sufficient to bring the property up to 100 per cent condition. *Re Indiana Teleph. & Teleg. Co. (Ind.)* No. 8282, April 23, 1926.

A composite average life of thirty years was used in computing the annual depreciation of a gas system. *Beaver Dam v. Wisconsin Power & Light Co. (Wis.)* U-3373, Oct. 30, 1926.

In *Re Western Crawford County Farmers Mut. Teleph. Co. U-3549*, July 29, 1927, the Wisconsin Commission said that a telephone company had followed the erroneous practice of deducting its annual allowance for depreciation from the value of its plant and that this made a book value grossly inadequate.

A telephone company should credit the depreciation reserve each P.U.R.1928E.

year with an interest allowance of 5 per cent of the balance in the reserve, the allowance for annual depreciation being computed on a 5 per cent sinking-fund basis. *Re Wisconsin Teleph. Co. (Wis.) U-3443, Nov. 23, 1926.*

III. Basis for computation.

a. In general.

The California Commission, in *Re Delta Teleph. & Teleg. Co.* Decision No. 18955, Application Nos. 13461, 13462, Oct. 25, 1927, was of the opinion that retirement of property should in part at least, be financed with charges to depreciation reserve and not entirely to the issue of stock, and for that purpose permitted an issue of only \$40,000 for certain improvements instead of \$50,000 asked in the application.

In *Re Bell Teleph. Co. (Can.) Case No. 955.71, Order No. 38777, Feb. 21, 1927*, where it appeared that the depreciation reserve of a telephone company amounted to 22.3 per cent of the average plant in service, it was said: "In view of the element of judgment of necessity involved in connection with depreciation ratios, and the amounts accruing therefrom, it would not be justifiable to say that it would be safe to limit the payment to reserve to losses actually accruing in given years, and regardless of the contingencies of change; nor would it be justifiable to say that on the record now before the board the percentage of reserve is excessive."

In *Re Central Illinois Pub. Service Co. No. 15945, Nov. 18, 1926*, in fixing water rates, the Illinois Commission said: "The record contains a compilation of annual accruing depreciation made by the Commission's engineer which is based primarily on his judgment as to the useful life of each of the various component parts of the property. It is to be noted, however, in this compilation no consideration is given to the fact that when an annual amount is set aside in a fund that this fund could and would earn interest. This fact must be given consideration in determining the annual amount to be placed in this fund if it is to return only the actual cost of the unit when replaced."

In *Dixfield Light & Water Co. v. Itself, F. C. 632, Sept. 16, 1926*, the Maine Commission held that a water company should adopt approximately 1 per cent of the reproduction cost less depreciation found to be the present fair value as an annual depreciation charge.

b. Straight-line and sinking-fund method.

An allowance of 3.5 per cent of the fixed operating property was made pursuant to the established policy of the Commission in computing depreciation for water companies on a straight-line basis. P.U.R.1928E.

Department of Public Works v. Chinook Water Works (Wash.) No. 6096, April 30, 1928.

The Washington Department of Public Works allowed a rate of 3.56 per cent for depreciation of a water utility property, exclusive of land, on a straight-line basis. North Bend v. North Bend Heat, Light, Water & Power Co. No. 6163, July 19, 1928.

The annual depreciation of a gas system was computed on a 5 per cent sinking-fund basis. Beaver Dam v. Wisconsin Power & Light Co. (Wis.) U-3373, Oct. 30, 1926.

In Re State Teleph. Co. U-3493, Jan. 19, 1927, the Wisconsin Commission computed an allowance for depreciation of telephone property on a 5 per cent sinking-fund basis.

In Re Weyauwega Teleph. Co. U-3582, June 28, 1927, the Wisconsin Commission considered depreciation of telephone company on a straight-line basis.

An annual allowance for telephone depreciation was computed by a 5 per cent sinking-fund method rather than by the straight-line method. Re Wisconsin Teleph. Co. (Wis.) U-3333, et al., June 15, 1926.

The sinking-fund method was used in the computation of telephone depreciation in preference to the straight-line method. Re Wisconsin Teleph. Co. (Wis.) U-3339, U-3423, Sept. 28, 1926.

An allowance for the depreciation of a telephone system was computed on a 5 per cent sinking-fund basis. Re Wisconsin Teleph. Co. (Wis.) U-3443, Nov. 23, 1926.

IV. Ascertainment of accrued depreciation.

A deduction for depreciation for cast iron water mains, in service for a considerable period, which was computed on a basis of one hundred years theoretical use for life, was approved. Re Vincennes Water Supply Co. (Ind.) No. 9036, April 20, 1928.

The measure of accrued depreciation was held by the Missouri Commission not to be the estimated cost of repairs necessary to put the property into 100 per cent operating condition. This we believe is merely an estimate of deferred maintenance, which is but a part of accrued depreciation. The Commission said that depreciation cannot be wholly overcome by repairs and that it is accrued depreciation and not deferred maintenance which must be deducted from reproduction cost new. Public Service Commission v. Missouri Gas & Electric Service Co. (Mo.) Case No. 3890, Jan. 5, 1927.

V. Rates for particular utility.

a. Automobile.

Depreciation of motor bus equipment was computed at the rate of 3 cents per motor bus mile. Re Vicory (Mo.) Case No. 5288, May 5, 1928.

P.U.R.1928E.

b. Electric.

An allowance for depreciation of an electric utility was placed at 4.40 per cent of the fixed operating property exclusive of the land. Department of Public Works ex rel. Deer Park v. Mount Spokane Power Co. (Wash.) No. 6071, May 10, 1928.

An allowance of 4 per cent was made to cover the annual depreciation of a municipal electric utility. Re Westby (Wis.) U-3456, Feb. 7, 1927.

c. Street railway.

An allowance was made of $3\frac{1}{2}$ per cent of depreciable street railway property for annual depreciation. Re Southern Indiana Gas & E. Co. (Ind.) No. 8278, March 6, 1926.

The sum of \$32,500 was allowed for the annual depreciation of a street railway valued at \$1,950,000. Merchants Asso. of Shenandoah v. Schuylkill R. Co. (Pa.) Complaint Docket Nos. 5953, 5960, Dec. 13, 1926.

d. Telephone.

In Re Bell Teleph. Co. (Can.) Case No. 955.71, Order No. 38777, Feb. 21, 1927, depreciation rates of a telephone company were approved as follows: On buildings, 2 per cent; on central office equipment where a change to automatic equipment was contemplated, 6.5 per cent; on switching machine equipment, 5.5 per cent; on private branch exchanges, 6 per cent; on office furniture and fixtures, 7.5 per cent; on wire lines and wire drops in exchange aerial service, 9.5 per cent.

A telephone company was allowed \$1,500 for annual depreciation of a system whose original cost was \$23,030. Re Bunker Hill Teleph. Co. (Ill.) No. 15076, March 9, 1926.

In Illinois Commerce Commission v. Teutopolis Teleph. Co. Nos. 16829, 16830, July 20, 1927, the Illinois Commission decided that a reasonable allowance as an item of operating expense to provide a reserve against depreciation was \$689 plus 6 per cent of all annual additions that might be made to the plant in the future.

An annual allowance of 6.63 per cent was permitted for the depreciation of telephone property. Re Peoples Teleph. Co. (Ill.) No. 17377, April 12, 1928.

An allowance of $4\frac{1}{2}$ per cent of the book value of a telephone was permitted for a rate of depreciation. Re Decatur County Independent Teleph. Co. (Ind.) No. 8652, April 1, 1927.

In Re Detchon, No. 8598, Aug. 26, 1927, the Indiana Commission ordered as follows: "It is further ordered that the rate charged for reserve for depreciation shall not exceed 3 per cent per annum of the depreciable property, which is hereby designated as the historic cost of the physical property."

P.U.R.1928E.

The Indiana Commission, in Re Laporte County Indiana Teleph. Co. No. 8929, Jan. 21, 1928, allowed a rate of 4 per cent for annual depreciation upon a showing that the company had charged a rate of 6 per cent per annum for fourteen years without any authority by the Commission where the testimony of both the company and the Commission engineers as to the percent condition in excess of 82 per cent clearly showed that an excessive rate had been charged.

The Indiana Commission ordered that a depreciation reserve fund should be provided on the basis of 4 per cent on the depreciated value of telephone property. Re Sims Co-op. Teleph. Co. No. 9470, Aug. 17, 1928.

An allowance of 5 per cent for depreciation was made in ascertaining the revenue necessary for a telephone company. Re Southern Indiana Teleph. & Teleg. Co. (Ind.) No. 8215, April 2, 1926.

An allowance of 5 per cent was made for the annual depreciation of a telephone plant. Re Southern Indiana Teleph. & Teleg. Co. (Ind.) No. 8416, Sept. 17, 1926.

In Re Southern Indiana Teleph. & Teleg. Co. No. 8729, May 2, 1927, the Indiana Commission ordered a telephone company to charge to operating expenses on account of depreciation not to exceed 3 per cent of the value of the physical property as shown by the books of the exchange.

An annual depreciation charge of 4.4 per cent of the cost of the depreciable property, or approximately 13 per cent of the total revenue, was found not unreasonable in view of the fact that allowances made by Commissions ranged between 4 and 8 per cent of the investment and from 12 to 20 per cent of the total revenues. Re Northwestern Bell Teleph. Co. (Neb.) Application No. 6775, Sept. 16, 1927.

The Nebraska Commission, in Re Osmond Teleph. Co. Application No. 6923, Nov. 30, 1927, stated: "It is the Commission's opinion that 11 per cent of what represents approximately the reproduction new value of the properties, is more than is necessary for maintenance and depreciation. The total requirement is reduced accordingly to the sum of \$577.96 or \$6,935.52 per year."

In Re Cincinnati & Suburban Bell Teleph. Co. No. 226, Feb. 7, 1927, the Ohio Commission held that an annual charge for depreciation reserve amounting to 5 per cent of the value of the depreciable physical property was proper.

An annual allowance of 5 per cent for the depreciation of a telephone system is reasonable. Re Peoples Teleph. Co. (Ohio) No. 202, Aug. 13, 1926.

In Re Moroni Teleph. Co. (Utah) Case No. 987, March 3, 1928, a telephone utility which had not previously maintained any depreciation reserve and which had kept insufficient records was re-P.U.R.1928E.

quired to make an annual allowance of 5 per cent for depreciation in the future.

An allowance of 5 per cent of the fair plant value of a Utah telephone utility was made for annual depreciation. *Re Salina Teleph. Co.* Case No. 976, Aug. 6, 1928.

The reasonable allowance for annual depreciation of a telephone company was found to be 5.73 per cent. *Department of Public Works v. Chehalis & Boistfort Teleph. Co.* (Wash.) No. 5935, Dec. 30, 1926.

e. Water.

An annual depreciation fund of \$1,300 was held to be adequate for a water system valued at \$70,500. *Re Los Altos Water Co.* (Cal.) Decision No. 17338, Application No. 12393, Sept. 14, 1926.

The sum of \$11,000, computed on an approximate $5\frac{1}{2}$ per cent sinking-fund basis, was held to be sufficient for a replacement annuity of a water system valued at \$737,676. *Re San Gabriel Valley Water Co.* (Cal.) Decision No. 17382, Application No. 11431, Sept. 22, 1926.

The Maine Commission was of the opinion that a water company should adopt not less than one per cent of its fixed capital as an annual depreciation charge. *Re Andover Water Co.* F. C. 668, Sept. 4, 1926.

The Maine Commission was of the opinion that a water company should include in its operating expenses and credit annually to its depreciation reserve a sum of approximately one per cent of its book value. *Kingfield Water Co. v. Itself.* F. C. 687, Dec. 16, 1926.

A water company was allowed 1 per cent for annual depreciation. *Brubaker v. Millersburg Home Water Co.* (Pa.) Complaint Docket Nos. 5411, 5412, Oct. 5, 1926.

An allowance of \$1,257 was made for the annual depreciation of a water system valued at \$100,000. *Hall v. Clarks Summit Water Co.* (Pa.) Complaint Docket No. 6273, et al. Oct. 25, 1926.

The sum of \$4,000 was held to be a proper allowance for the annual depreciation of a water system valued at \$400,000. *Kittanning v. Armstrong Water Co.* (Pa.) Complaint Docket No. 5858, Sept. 21, 1926.

The sum of \$900 for the annual depreciation of a gravity water system valued at \$135,000 was reasonable. *Rockwood v. Rockwood Water Co.* (Pa.) Complaint Docket Nos. 6284, 6555, Oct. 5, 1926.

An allowance of \$500 is adequate for the annual depreciation of a water system valued at \$17,200. *Shaver v. Shavertown Water Co.* (Pa.) Complaint Docket No. 6405, et al. Dec. 13, 1926.

In *Department of Public Works ex rel. Patrons v. Comfort*, No. 5947, June 28, 1927, the Washington Commission made an allow-P.U.R.1928E.

ance of 5 per cent of the fixed operating property of a water utility, exclusive of land for annual depreciation.

An allowance of 2 per cent of the fixed operating property exclusive of land and intangibles was a reasonable allowance for the annual depreciation of a water system. Department of Public Works ex rel. Patrons v. Easton Water System (Wash.) No. 5958, Dec. 2, 1926.

An allowance of 3.83 per cent of the fixed operating property exclusive of land and intangible capital, was made for the annual depreciation of a water system. Department of Public Works ex rel. Patrons v. Republic Water Co. (Wash.) Cause No. 5818, Dec. 22, 1926.

An allowance of 3.87 per cent of the fixed operating property of a water system exclusive of land was made for depreciation. Department of Public Works ex rel. Patrons v. Westminster Water Works (Wash.) No. 6002, March 25, 1927.

An allowance was made of 1 per cent for depreciation in ascertaining the net revenue of a water system. Re Peoples Water, Light & P. Co. (Wis.) U-3311, March 27, 1926.

INDIANA PUBLIC SERVICE COMMISSION.

RE RUSH COUNTY POWER COMPANY.

[No. 9395.]

Intercorporate relations — Collection of connection charges — Electricity.

1. Money collected from prospective patrons for connection of electric extensions should be held and credited to the company with whose lines the connections are to be made, and any other company collecting such funds should be made to account to the responsible company for all charges so collected, p. 672.

Security issues — Improper organization — Public necessity.

2. Securities proposed by an electric company guilty of irregular and improper methods of collecting connection charges were approved with reluctance in view of the great need of the public for immediate service, p. 673.

Equipment and construction — Electric transmission line.

3. An electric company found to have imperfect and dangerous construction was ordered to comply with the provisions of the National Electrical Safety Code of the department of commerce before collecting any money for further extensions, p. 677.

P.U.R.1928E.

Service — Extensions — Charge to consumers — Actual cost — Electricity.

4. All extensions for service which are chargeable to the consumer should be installed at actual cost, p. 677.

Valuation — General construction costs — Contract structure.

5. No allowance was made for general construction costs including engineering, general supervision, legal aid, taxes, and other expenses of a plant which was constructed by contract according to a plan without precedent and the sole work of the chief promoter of the enterprise, p. 678.

Valuation — Working capital — Electricity.

6. An allowance of \$3,900 was made for working capital of an electric plant, making a total value of approximately \$68,339, p. 678.

[September 21, 1928.]

PETITION of electric company for approval of a security issue; granted upon certain conditions.

Appearances: Smith, Remster, Hornbrook & Smith, By Judge Charles A. Remster, Indianapolis, C. W. Duncan, Rushville, for petitioner.

Harmon, Commissioner: On the 4th day of June, 1928, petitioner filed its petition herein, in words and figures following to-wit: [Petition and amendment omitted.]

A later hearing was held in said cause on the 7th day of September, 1928, and additional testimony was taken.

It was developed in the original hearing and later hearings of said cause that the Rush County Power Company was an Indiana corporation with a capital of 100 shares of common stock of no par value, organized under the Manufacturing and Mining Act of the state of Indiana, with its principal office and place of business in the city of Indianapolis, Marion county, state of Indiana.

It was shown that the directors and stockholders of the Rush County Power Company were Joseph W. Dale, George Waterous, and Alice M. Ryan. The evidence developed that the properties claimed to be owned by the Rush County Power Company were built by the Hydro Electric Engineering Corporation, an Indiana corporation whose business was defined to be "hydraulic and electrical construction and engineering and any associate or interconnected business."

The officers, directors and stockholders of the Hydro Electric P.U.R.1928E.

Engineering Corporation were the same persons, namely Alice M. Ryan, Joseph W. Dale, and George Waterous, who were the directors and officers of the Rush County Power Company.

Petitioner offered certain evidence in the form of appraisals and audits. However, the report of the engineering department of this Commission showed that the transmission lines of the Rush County Power Company had been built without any regard to recognized engineering practice, as approved November 15, 1927, by the American Engineer Standards Committee, and in entire disregard of the plans recommended by the department of commerce of the United States of America, in the National Electrical Safety Code, adopted by it on December 31, 1926.

The engineering department of this Commission, in passing on this construction, says: "We believe that, if he (Mr. Waterous) continues with the present type of construction along the public highways, he will create a hazard far in excess of the benefit afforded to the people of the community which he serves."

The investigation of the Public Service Commission also developed the fact that the Rush County Power Company was entirely disregarding the rules of the Public Service Commission as to connection charges. Quoting from the report of the engineering department the following was shown: "The company requires a payment from any customer who wishes service from their lines. In the towns of Ogden and Mays, this connection charge is \$108 and in Raleigh, Bentonville, Falmouth, Fairview, Orange, and New Salem, this charge is \$200. To any other point on the transmission system, this connection charge is equal to the estimated cost of construction to serve.

As near as I can determine, these connections are installed by the Hydro Electric Engineering Corporation, and the Rush County Power Company connects the consumer up free of charge."

[1] A very striking thing was developed in that apparently, so far as records of the Rush County Power Company are concerned, those records do not show that any amount collected from the consumers for connection charges ever came into the treasury of the Rush County Power Company. Apparently all this money was paid, in addition to the common stock issued to the Hydro P.U.R.1928E.

Electric Engineering Corporation, hereinafter referred to, as the cost of building these lines. If this money belongs to the Rush County Power Company (and it clearly does, as the connection was made with lines owned by said company) the Hydro Electric Engineering Corporation should be made to account to the Rush County Power Company for all connection charges ever collected for the purpose of putting these consumers on the power company's lines.

[2] On the whole, the scheme of organization of this company is not to be commended and, were it not for the fact that this service is apparently badly needed by the persons now connected with it, the entire plan would be disapproved and this petition dismissed. However, money for connection charges has been paid by consumers; these people would be left without any service and greater harm would be done probably by refusing to approve than by the approval, which will be hereinafter made.

The evidence disclosed that George M. Waterous was the moving power apparently in the organization of both the Hydro Electric Engineering Corporation and the Rush County Power Company; that Joseph W. Dale and Alice M. Ryan were associated with him in these ventures. What apparently has happened is that Waterous prompted the organization of both Indiana corporations, collected money to build the lines, built them with his own organization, so far as they are built, and paid to himself the money rather than to the Rush County Power Company. The Commission regards Mrs. Ryan and Mr. Dale as more or less innocent parties to the transaction.

To show how well Waterous performed his task, the report of H. W. Abbott and C. W. Whitney, engineers in the employ of the Public Service Commission of Indiana, is set forth in its entirety:

"Mr. Whitney and I made an inspection of the property of the Rush County Power Company, located in Henry, Rush, and Fayette counties, on August 20th and 21st.

"The property consists of transmission and rural lines, including lines in a few unincorporated towns.

"The system was inspected with a view to its safety, as well as the general type of construction. Below find certain definite
P.U.R.1928E. 43

points where we have seen fit to make recommendations for changes.

"(1) On north section, just northeast of junction point with new right of way, where the power line is over a telephone line. The power line will carry 13200 volts on top arm and indications are that a 2300 volt line will be placed below on brackets. This arrangement gives only 2½-foot clearance at power company's pole, which will be too close. We recommend that the telephone line be lowered, or the 2300 volt line be raised and placed on crossarms to give clearances at all points as required in 'National Safety Code.'

"(2) On north section near residence of Harry Ellis, the line passes over a barn of frame construction. When a 2300 volt line is run below the 13200 volt line there will not be proper clearance between the top of the barn and the 2300 volt line. We recommend that either a supporting structure be placed on the barn, or an extra pole set to keep the proper clearance as set out in the 'National Safety Code.'

"(3) At residence of Harry Ellis, the service drop crossed the highway giving only 17-foot clearance. Raise to 18-foot clearance.

"(4) Northeast of residence of Harry Ellis, the secondary has only 12½-foot clearance along the road. Raise 2300 volt circuit and also secondary circuit to give proper clearances required in 'National Safety Code.'

"(5) Spur off Cadiz line at end of line at Rose Lawn stock farm, service drop has only 14-foot clearance over highway. Raise to 18-foot clearance.

"(6) Place where line crosses road west of Westwood near interurban line, secondary crosses highway with only 16-foot clearance. Raise to 18-foot clearance. 13200 volt circuit should be placed on double arms to give room for above change.

"(7) All secondary east of above point should be raised to give proper clearance. Some points now only 10 feet above ground.

"(8) Poles as set on new right of way for 13200 volt line show spans much too long. No wire is strung at present, but indications are that if good engineering practice is followed in P.U.R.1928E.

allowing proper sag in comparison to span length, that several points will be below the 20-foot allowable clearance. The wire manufacturer's recommendations for sag and tension should be followed and if proper clearance is not obtained the pole spacing should be decreased.

"(9) East from Center toward Mays. Present circuits are 6600 volts above on crossarms, and 2300 volts below on brackets, and all mounted on 25-foot poles. If the above circuit is increased to 13200 volts, the spacing between the two circuits should be 4 feet. This would force the 2300 volt circuit below the 18-foot clearance, which it now has. The only solution suggested is to increase the heights of the poles, if top circuit is increased to 13200 volts.

"(10) On line from Raleigh to Gings, 2300 volt line swings out over road and has only 14-foot clearance. Raise to give 20-foot clearance.

"(11) At first transformer west of Fayette-Rush county line and east of Raleigh, 6600 volt line has only 16-foot clearance. Raise to meet 'National Safety Code' requirements.

"(12) Line from junction to Bentonville, now on 25-foot poles, spaced 210 feet. Part of this line is over telephone circuits. If this voltage is increased to 13,200 volts, higher poles should be used to give proper clearance as set out in 'National Safety Code.' It is suggested that a transformer station may be placed at junction and a 2300-volt, 3-phase, circuit run to Bentonville on present pole line, using larger conductors.

"(13) On Raleigh-Glenwood road at residence of E. L. Stuckey, 2300-volt circuit has only 19-foot clearance and secondary has only 16-foot clearance above driveway. Raise both circuits to give proper clearance.

"(14) Line south of Glenwood, 6600 volt and 2300 volt. 2300 volt has only 18-foot clearance over road, and has only about 1-foot clearance over telephone wire. Give 20-foot clearance over road, and proper clearance from telephone circuit as shown in 'National Safety Code.'

"(15) At Orange, set pole in 1st span south of Orange and raise secondary circuits to proper clearance on existing poles.
P.U.R.1928E.

Span is now 325 feet and clearance only 11 feet in center of span in front of a residence.

"(16) Where line crosses highway between Orange and New Salem, where circuit goes north, 2300-volt circuit has only 19-foot clearance over highway. Raise to 20 feet.

"(17) Raise service drop to 18-foot clearance at Geise residence, north of church, north of Salem. Now 16 feet above highway.

"(18) Northeast of New Salem near residence of Omer Mahan, last six poles are 20-foot and carry 2300 volts giving only 15-foot clearance. Either set transformer back on higher poles, so circuit will only be 110 volts, or set higher poles to give proper clearance.

"(10) Northeast of Salem at residence of Willard P. King, service drop has only 15-foot clearance over highway. Raise to 18 feet.

"General observations on construction show the spans to be exceptionally long and wire tight. The system contains considerable number 6 and number 8 stranded aluminum cable, steel reinforced. The maximum span, as given in the 'National Safety Code' for number 6 aluminum cable, steel reinforced is 150 feet. Number 8 is not listed. For spans greater than 150 feet, number 4 aluminum cable is the smallest size allowable. Since this company is using number 6 and number 8 in spans of from 175 to 350 feet, it is constructing lines which will not pass the 'National Safety Code' requirements.

"The greater part of the 2300 volt circuits are carried on oak brackets. This is not to be recommended, because it does not give sufficient climbing space. This is unusual for 2300 volts to be supported on brackets and presents an unnecessary hazard. This type of construction should not be used except for secondary.

"The advisability of using 17-inch locust pins to support 13,200 volts is to be questioned especially if long spans are used. The use of steel pins or pole top brackets are preferred due to their added strength.

"The system as it is now constructed contains practically no lightning arresters. Our questions from some of the customers brought out the fact that their lights went out at practically
P.U.R.1928E.

every storm and were out for considerable time. Good engineering practice calls for lightning arresters throughout the system.

"Our whole impression of the construction, is that it is entirely original with Mr. Waterous. He has not followed proven types of construction, or good engineering practice. He has disregarded the 'National Safety Code,' and has exceeded the manufacturer's maximum ratings on many of the materials he used. We do not approve of this type of construction.

"We believe, that if he continues with the present type of construction along the public highway, that he will create a hazard far in excess of the benefit afforded to the people of the community which he serves."

[3] It is perfectly apparent that before any money should be spent in making further extensions to the lines of the Rush County Power Company, the recommendations of the engineering department should be complied with in their entirety. When these recommendations are complied with, any building in the future should be done in strict conformity with the provisions of the National Electrical Safety Code hereinbefore referred to and under the supervision of this Commission.

[4] The Commission is also of the opinion that all extensions for services which are chargeable to the consumer should be installed at actual cost as shown under paragraph headed "Construction Cost" in the "Purpose and Regulations Covering Rural Extensions," as approved by the Public Service Commission of Indiana June 1, 1923, Cause No. 6921, in order that all available consumers may be attached and that any and all monies coming from such source shall be paid to the Rush County Power Company and accounted for on the books of said public utility. If proper bookkeeping methods are used by the Rush County Power Company, it is reasonably apparent that the said company will have enough income to pay its fixed charges and take care of the interest charges and retirement charges of the securities herein sought to be issued.

It is also clear that if and when these lines are put in proper conditions, there will be enough property owned by the company to justify the issuance of such securities. However, the way
P.U.R.1928E.

these lines are now built, they constitute a positive menace to the safety of the residents of the state of Indiana. To permit this kind of construction to exist, any longer than possible to repair same, is to place potential death traps in many places where an unsuspecting public may come in contact with them.

In the case at bar the appraisal tendered by the engineering department of the Public Service Commission of Indiana, showed the following present values—

Land	\$1,121.00
Equipment—present value depreciated	61,285.00
General equipment	33.00

or a total value of land, equipment and general equipment of \$62,439.

[5] To this the engineering department has added general construction costs including engineering, general supervision, legal expenses, taxes during construction, etc.

Inasmuch as this, according to the evidence, was built on contract, and according to a plan which the engineering department says has practically no precedent and was the work of Mr. Waterous alone, the Commission is not in sympathy with allowing this item, nor does it think that at the present time the going value of the organization would be anything like \$7,000. It would be inclined to feel that \$2,000 would be the limit, and for the purpose of this order, that sum is accepted.

[6] So far as the item of working capital is concerned, \$3,900 is not unreasonable. Therefore, the Commission finds that the present value of this property is something in the neighborhood of \$68,339. The Commission, however, believes that when the changes and additions to the plant suggested by the engineering department of this Commission are finally made, the value will be greater and that when the extensions, additions, and betterments suggested by petitioner are accomplished that the securities sought to be issued at this time, namely \$50,000, will have sufficient basis to justify their issuance.

Singleton, McCardle, Ellis, McIntosh, Commissioners, concur.
P.U.R.1928E.

WISCONSIN RAILROAD COMMISSION.

COUNTY OF MILWAUKEE

v.

MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY.

[R-3448.]

Rates — Street railways — Fare zones — City limits.

Fare zones may properly be established without regard to the city limits on a street railway line to produce additional revenue, where it can be shown that the particular line is unprofitable to the extent of burdening the balance of the system.

[October 1, 1928.]

PETITION of a street railway company for an adjustment of fares on a zone limit basis; granted.

By the Commission: The petition in this case was filed on August 15, 1927, and requests the Commission to investigate the feasibility of extending the single fare zone limit on the Howell avenue-Tippecanoe line of the Milwaukee Electric Railway & Light Company in the town of Lake.

Hearing in the case was held in Milwaukee on May 9, 1928, at which the following appearances were entered: Herbert J. Piper, for town of Lake; Dan Sullivan and Eugene Warnimont, for county of Milwaukee; Delbert Miller, for city of West Allis; F. J. Rucks and W. H. Shackton for Unincorporated Community of Tippecanoe; James D. Shaw, for the Milwaukee Electric Railway & Light Company.

The present Milwaukee city fare limit on the Howell avenue-Tippecanoe line was established at Howell and Morgan avenues by an order of the Commission issued on October 28, 1914, 15 Wis. R. C. R. 330. The petitioners in their testimony at the hearing represented that the city limits of Milwaukee have been extended since that date and that the territory in the excess fare zone has developed to an extent that would justify the extension of the city fare limit.

The company in support of its contention that the present single fare limit should not be changed submitted numerous ex-P.U.R.1928E.

hibits showing the results of operation of the city and suburban railway systems for the past eight years, the results of operation of the line under consideration for the same period, and numerous statistics showing the trend of the results of railway operations in the city of Milwaukee and the contiguous suburban territory.

In considering this case it is best to state at this point that while it is convenient and very frequently desirable in fixing street railway rates to make the city limits the limits of the single fare area, it does not necessarily follow that the two must coincide. Street railway rates must be based upon cost and where it can be shown that a particular line of a city system is unprofitable to an extent to burden the balance of the system, zone rates may properly be established on such a line to produce additional revenue without regard to the city limits.

From the exhibits submitted by the company it is shown that during the last eight years the city railway system has earned an average of 5.16 per cent return on the investment and that the suburban railway system sustained an average loss during the same period of .32 per cent of the investment. The trend of the net earnings of both systems during the last five years has been continuously downward and with the rapid increase in the ownership of autos there is little prospect for any improvement in the conditions.

The exhibits further show that during each of the last six years the operating revenues per car mile for cars on the line in question have been the lowest of any line in the entire city system.

With these facts before us, namely, that the city railway system has been operating without a full return, that the suburban railway system has been operating with practically no return, and that the line under consideration is the least profitable line of the entire city system we cannot find that conditions would justify our ordering an extension of the city fare limit on the Howell avenue-Tippecanoe line. The complaint in this case is therefore dismissed.

P.U.R.1928E.

COLORADO PUBLIC UTILITIES COMMISSION.

HITCHCOCK & TINKLER EQUIPMENT COMPANY

v.

DENVER & SALT LAKE RAILWAY COMPANY.

[Case No. 384.]

MOFFAT TUNNEL IMPROVEMENT DISTRICT

v.

DENVER & SALT LAKE RAILWAY COMPANY.

[Case No. 385.]

[Decision No. 1924.]

Evidence — Discontinuance of spur track — Violation of order.

The sole consideration on a complaint against the discontinuance of a spur track by a railroad without leave of the Commission in violation of its general order is to determine why such order was disregarded and evidence as to lack of necessity or safety of such equipment is immaterial.

[September 29, 1928.]

COMPLAINT by a shipper against the discontinuance of a spur track by a railroad; service ordered to be resumed.

Appearances: Whitehead and Vogl, Denver, for Hitchcock & Tinkler Equipment Company; Montgomery and Myer, Denver, for the Moffat Tunnel Improvement District; Elmer L. Brock, Denver, for the Denver & Salt Lake Railway Company.

By the Commission: The above complaints were filed against the Denver & Salt Lake Railway Company, a common carrier operating a steam railroad system within the state of Colorado, in which it is alleged in substance that a switch or spur track located at West Portal, Colorado, was abandoned and discontinued by the rail carrier without any notice to this Commission, as required under General Order No. 15, issued by this Commission on April 13, 1916 (anno.) P.U.R.1916F, 352.

Answer was filed by the defendant, which, in substance, is a general denial of the complaint, and an allegation that prior to the institution of this proceeding the rail carrier removed the spur track complained of in the complaint for the reason that its existence, and particularly its connection with the main line, P.U.R.1928E.

presented a serious hazard to railroad operations, the employees and the public, and that the spur in question was never a standard spur but was a temporary arrangement in connection with the construction of the Moffat tunnel.

The answer admits also that incidental to the construction of the Moffat tunnel the Moffat Tunnel Commission caused a certain railroad switch or spur to be constructed connected with the main line of the Moffat road at or near West Portal, and that said switch or spur was constructed for and used by the Tunnel Commission in connection with the construction of the Moffat tunnel; that the spur track was the property of the Moffat tunnel; that the complainant, Hitchcock & Tinkler Equipment Company, requested the rail carrier to deliver cars on said spur and that it has refused to permit Hitchcock & Tinkler Equipment Company to lead cars on said spur; that the Hitchcock & Tinkler Equipment Company has served upon the rail carrier a request in writing from the Moffat Tunnel Commission that the rail carrier furnish to the complainant cars on said spur. The answer was filed in Case No. 384, but by stipulation was also considered as the answer in Case No. 385.

The matter was set down for hearing in the hearing room of the Commission, State Office Building, Denver, Colorado, on September 24, 1928, on which date some testimony was received. Thereafter further testimony was received on September 29, 1928.

After the introduction of testimony by both complainants, including testimony by the president of the rail carrier on cross examination, a motion was made by the complainants to restore the service and spur which had been discontinued and abandoned. After some argument by counsel, the Commission decided to grant the motion and issue an order requiring the rail carrier to restore the switch or spur and the service thereon by the rail carrier within five days from the date hereof.

General Order No. 15, *supra*, one of the general orders duly adopted and promulgated by this Commission to regulate common carriers, and in force and effect ever since April 13, 1916, provides that no steam carrier shall discontinue its service, or any part thereof, or remove its tracks or any part thereof, with-
P.U.R.1928E.

out first having filed with this Commission a written notice of its intention to discontinue, abandon, or remove its service or tracks, or any part thereof, within the state of Colorado, said notice to be filed with the Commission thirty days prior to the discontinuing of its service, or the abandonment or removal of its tracks, or any part thereof.

The testimony shows that the steam carrier discontinued this service and abandoned this switch or spur without complying with General Order No. 15, *supra*, and over the objections of both of the complainants. A temporary injunction was sought in the district court of the city and county of Denver by the complainants in Case No. 384 which was denied by the court on the ground that this Commission had ample jurisdiction over this matter, and that, therefore, the complainant has a remedy without injunction.

It is admitted that the spur track was constructed in January, 1928, prior to the time the rail carrier used the main track, with which the spur is connected, for its main line operation, and that it was used down to about the time of its removal. Since approximately February 26, 1928, the main track adjoining said switch has been used as the main line of the steam carrier. It is admitted that the Moffat Tunnel Commission has used the spur track in question in shipping in sand and gravel and other commodities, and the Hitchcock & Tinkler Equipment Company have been using the spur track in shipping out from West Portal several carloads of machinery and equipment.

The spur or switch track in question was discontinued, torn up, and removed sometime about September 7, 1928, by and with the consent and authority of the president of the rail carrier. This, in our opinion, was in violation of General Order No. 15, *supra*.

The defendant contends that the spur track in question was not reasonably necessary, and was hazardous and only of a temporary construction. So far as the reasonableness of the spur, as well as the hazard is concerned, that is an issue that would have properly come up if the rail carrier would have pursued its remedy under General Order No. 15, *supra*. All this Commission is attempting to determine now is whether this switch or P.U.R.1928E.

spur, and the service thereon, was rendered by the rail carrier to the complainants prior to the abandonment, and whether the discontinuance and abandonment was in violation of General Order No. 15, *supra*. We are not now attempting to determine the reasonableness of a spur at the place in question, nor the hazards that may be involved. Under the Public Utilities Act the carrier has its remedy in raising those issues in a very peremptory way and a very expeditious manner. No sound reason can be given why General Order No. 15, *supra*, under the facts and circumstances of this case, should have been disregarded.

In view of the admissions of the president of the rail carrier, the answer of the rail carrier, and the admission of counsel for the rail carrier that Hitchcock & Tinkler Equipment Company used said switch or spur in shipping from West Portal approximately twelve carloads of material in cars placed upon said spur for it by the rail carrier, it is clear that this switch or spur was a facility and service used by the rail carrier in serving the complainant, the Moffat Tunnel Improvement District and Hitchcock & Tinkler Equipment Company, and, it is reasonable to assume, under the law and all the facts and circumstances, any other part of the public that wanted to use the same.

This Commission has always taken the position that rail carriers are required by General Order No. 15, *supra*, to secure authority from it before abandoning service on and tearing up spur tracks. The carriers apparently have taken the same position. A number of applications for such authority have been filed recently. Therefore, in view of the admissions as to the existence and use by and with the consent and co-operation of the rail carrier of the spur in question over a period of many months, no useful purpose could be served by prolonging the hearing by taking evidence as to the hazard of this spur and the adequacy of other sidings, which should properly be heard in a hearing on an application by the carrier for authority to remove the spur and abandon the service thereon.

After a careful consideration of the matters herein, the Commission is of the opinion, and so finds, that the Denver & Salt Lake Railway Company should be required to restore the switch track and the service in connection therewith within five days from the date of this order.

P.U.R.1928E.

ILLINOIS COMMERCE COMMISSION.

CENTRAL NORTHWEST BUSINESS MEN'S ASSOCIA-
TION

v.

CHICAGO SURFACE LINES.

[No. 17741.]

Automobiles — Operation by a traction company.

A traction company was not permitted to establish a permanent feeder bus system out of a special equipment fund where there was doubt as to the charter powers of the company to engage in both operations, and where its franchises had already expired, thereby creating a new problem, the solution of which would be complicated by permitting local transportation agencies to engage in new types of service.

[September 19, 1928.]

PETITION of a traction company for authority to operate busses; denied.

By the Commission: By an order entered by this Commission on November 18, 1926, in Case No. 15,444 (anno.) P.U.R. 1927C, 135, the respondent was authorized and directed to install and operate motor coaches in conjunction with and supplementary to its existing street railway system, with interchangeable transfers, on Diversey avenue between North Crawford avenue and North Laramie avenue. Subsequently, the receivers of respondent (appointed December 15, 1926) under authority of an order of the United States District Court appointing them, purchased motor coaches and installed the operation provided for in said order of the Commission. Following the inauguration of this operation, complainant herein filed a complaint with this Commission praying for an order directing an extension by Chicago Railways Company, respondent, of its street railway facilities by means of such motor bus auxiliary service on the following streets:

Diversey avenue from Milwaukee avenue to North Crawford avenue; Diversey avenue from North Laramie avenue to the western city limits; Belmont avenue from North Central avenue to the western city limits; North Central avenue from Grand P.U.R. 1928E.

avenue to Irving Park boulevard; North Narragansett avenue from Grand avenue to Irving Park boulevard.

After hearings held upon the said complaint, this Commission entered an order on January 26, 1928, ordering and directing respondent to maintain and operate such auxiliary or supplemental motor coaches over a portion of the thoroughfares prayed for in the complaint, to-wit:

Diversey avenue from North Laramie avenue to North Narragansett avenue; Diversey avenue from Milwaukee avenue to North Crawford avenue; Belmont avenue from North Central avenue to North Narragansett avenue.

The order expressly provided that all of the motor bus operations therein authorized should be operated as extensions of and supplementary and auxiliary to and as part of the existing street railway lines of the Chicago Railways Company.

No money has been expended by respondent, Chicago Railways Company, for the acquisition of motor busses to be used in supplying the service provided for in the Commission's order of January 26, 1928, and no such busses or equipment have been acquired to date for use in such operation.

On the 15th day of May, 1928, nearly four months after the passage of said order Chicago Railways Company filed in the same case a petition for an order of the Commission granting authority to the company to expend from the so-called "Special Equipment Fund" of said company the cost of acquiring motor busses and providing storage and maintenance facilities therefor necessary for the operation of the same under the order entered by the Commission on January 26, 1928.

The Commission, in an order entered the 23rd day of September, 1925, in Case No. 15,444, involving an application of the city of Chicago for an order authorizing and directing the Chicago Railways Company to expend from said "Special Equipment Fund" money necessary to construct the sundry street railway extensions ordered by the City Council to be constructed in the year 1925, discussed the creation and purpose of this "Special Equipment Fund" at length and for that reason we shall not go into the matter in detail herein. Suffice it to say that this fund was created by an order of the Illinois Public Utilities P.U.R.1928E.

Commission on July 31, 1920, which directed that 8 per cent of the gross receipts of the companies constituting the Chicago Surface Lines be set aside in a special fund called the "Special Equipment Fund" and that from the portion of said fund which was set aside for each of the constituent companies of the Chicago Surface Lines, after the payment by such companies of current renewal charges, the remainder should be expended for the purchase of additional equipment.

Hearings were held by the Commission on said application of the Chicago Railways Company for authority to expend money from the "Special Equipment Fund" for the purpose of inaugurating the operation concerned in the Commission's order of January 26, 1928, at which hearings the evidence showed that Chicago Railways Company desired authority to immediately expend about two hundred and four thousand dollars out of said fund for the purchase of seventeen busses and equipment for the same, and that within a year estimated that the extension of the operation would require a total expenditure of \$336,000 for the auxiliary motor bus service in question.

At the hearing upon this phase of the matter a representative of the Corporation Counsel's office appeared and advised the Commission that in view of the fact that the franchise under which the surface lines had been operating had expired, the city felt that at this time there should be no extension of any bus lines or feeder systems by the surface lines.

In view of the substantial amount of money which the record showed that the inauguration of an auxiliary or feeder bus service authorized by the Commission's order of January 26, 1928 would require to be withdrawn from the "Special Equipment Fund" of that company, the Commission has felt that it is desirable to give further consideration to the entire question of the operation of so-called "feeder" or auxiliary motor busses by the street railway companies constituting the Chicago Surface Lines.

At the time the Commission entered its order of November 18, 1926, in Case No. 15,444 (anno.) P.U.R.1927C, 135, in which the initial feeder bus operation by the Chicago Railways Company on Diversey avenue was authorized, the entire matter P.U.R.1928E.

came before the Commission in the nature of an emergency and no extensive consideration was given at that time to the question of whether the Commission should favor, as a measure of general policy, such auxiliary motor bus operation by the street railway companies operating in Chicago. The superior court of Cook county on appeal from said order of November 18, 1926, *supra*, has recently rendered an opinion which, while sustaining the order in question, does so obviously upon the theory that the order was entered to meet an emergency, and that the operation of auxiliary busses by the Chicago Railways Company in the instance in question was not intended as a permanent installation, but was merely to fill a temporary need until the Commission should decide finally whether the public convenience and necessity required the operation of a street car line on the portion of Diversey avenue under consideration. The clear intimation of the superior court's opinion is that the Chicago Railways Company would have no power under its corporate charter to operate auxiliary feeder busses as a permanent part of its system, for, in affirming the right of the company to operate such busses under the terms of the order in question, the court states, as a basis for its views, that in cases of emergency a corporation may possess and exercise powers to meet a temporary situation which would not exist under ordinary circumstances.

In order to give a thorough reconsideration to the whole matter of auxiliary or feeder bus operation in the city of Chicago, the Commission on June 23, 1928, served notice on all parties interested in the matter advising them that the Commission would hold a hearing for the purpose of determining whether to rescind, alter, or amend the order entered by it on January 26, 1928, in the instant case. The hearing in question was held in the office of the Commission at Chicago, Illinois, on July 12, 1928, and the various parties interested appeared and expressed their views to the Commission. Since that time the Commission has given very thorough consideration not only to the question of what its policy should be regarding the operation of motor busses as auxiliary or supplemental to the operation of street railway companies in question, but also to the purposes for which the so-called "Special Equipment Fund," out of which the street P.U.R.1928E.

railways company desire to finance such operation, was created and for which it should at the present time be employed.

The record of the hearings in Case No. 9,357 before the Illinois Public Utilities Commission in which the order of July 31, 1920, establishing the fund, was entered, reveals that all discussion as to the creation of this fund centered on its use for buying necessary additional equipment and that the only type of equipment under consideration at that time was street car equipment, counsel for Chicago Surface Lines pointed out at that time that there was a large amount of money lying idle in the renewal fund of the company in excess of the amount required for current renewals and suggested that it could "be put into new ears" and that no additional amount should be charged to the capital account therefor until the amount taken from the renewal fund was replaced.

The Commission, after a consideration of the use of this fund since the time of its creation, believes that experience has shown that the fund is reasonably required for the purchase and acquisition of additional street car equipment and the construction of street railway tracks, and that it would not be desirable to make any extensive use of this fund for other purposes. In determining its policy with respect to the operation of auxiliary feeder busses by the companies constituting the Chicago Surface Lines, the Commission has given consideration to the fact that public transportation should be established on a permanent and settled basis and that the solution of the transportation necessities of any community should not be of a temporary and unsettled nature. Except in cases of rare emergency the Commission does not favor entering orders based upon temporary expediency, nor does it favor the authorization of the inauguration of any public utility transportation of a temporary kind. The reasons for such policy are obvious. The growth of the city follows new transportation lines. Homes are built, investments are made based upon the permanent existence of the transportation in question, all of which makes it exceedingly undesirable that any transportation service should be installed which is merely of a transitory or impermanent nature. Under the decision of the superior court above referred to, this Commission believes

that it is very questionable whether an auxiliary motor bus operation could be legally installed and operated by the street railway companies in Chicago as a permanent part of their systems and the Commission does not believe that it is warranted in permitting the inauguration of such service merely as a temporary expediency.

It is a matter of common knowledge that the franchise grants of the various street railway companies in the city of Chicago, passed in the year 1907, have expired and have created a traction problem which the agencies concerned are devoting extensive efforts to solve. Serious consideration has been given to the consolidation or unification of the various transportation agencies in the city of Chicago, at least as regards operation, as a part of said solution. This is another reason why the Commission believes it undesirable to authorize any extensive motor bus operation by the street railway companies. When the time comes to work out a satisfactory solution of this problem, the Commission believes that negotiations will be less hampered and it will be less difficult to deal with the agencies operating the various types of local transportation if each agency is operating the character of service it was organized to perform.

After careful consideration of this entire matter and all of the evidence in this case and having listened to the arguments of counsel, the Commission finds that:

1. The operation of motor bus lines in connection with and supplementary to and as a permanent part of the existing system of street railways in Chicago and as part of the system known as the Chicago Surface Lines is not desirable and as a matter of policy should not be permitted.

2. The operation of motor busses in conjunction with and as an extension of and supplementary to the existing street railway system of the Chicago Railways Company and as a part thereof with interchangeable transfers on Diversey avenue between North Laramie avenue and North Narragansett avenue, on Diversey avenue between North Crawford avenue and Milwaukee avenue, in lieu of existing street car service on that part of Diversey, and on Belmont avenue between North Central avenue and North Narragansett avenue, should not be authorized.

P.U.R.1928E.

3. The complaint filed herein by Central Northwest Business Men's Association praying for an order directing respondent, Chicago Railways Company, to extend its street railway facilities by means of motor bus auxiliary or supplementary service on Diversey avenue from Milwaukee avenue to North Crawford avenue, Diversey avenue from North Laramie avenue to Western City limits, Belmont avenue from North Central avenue to western city limits, North Central avenue from Grand avenue to Irving Park boulevard, and North Narragansett avenue from Grand avenue to Irving Park boulevard, should be denied.

4. The supplemental application of the Chicago Railways Company filed in the instant case praying for leave to expend from its portion of the "Special Equipment Fund" of Chicago Surface Lines an amount up to \$336,000, \$204,000 to be expended immediately, should be denied.

5. The order entered herein by this Commission, on January 26, 1928, should be annulled, rescinded, and set aside and the authority conferred therein upon the Chicago Railways Company to maintain and operate auxiliary or supplemental busses in connection with the street railway system, should be revoked, annulled, and cancelled.

MISSOURI PUBLIC SERVICE COMMISSION.

RE SHIPPEY, MADDIN & PARISH GAS COMPANY.

[Case No. 5902.]

Certificates — Unauthorized construction — Public interest.

1. The Commission will not grant authority to do that which has already been done, such as construction and operation of parts of a proposed gas distribution plant, previous to the request for authority, although such error of the applicant will not be permitted to jeopardize the interest of the people and cities already served, p. 695.

Certificates — Consent of local authority.

2. The Commission will not undertake to grant certificates of convenience and necessity to construct or operate a gas transmission system in any town or city which has not voted a franchise authorizing such business within its boundaries, p. 695.

[September 18, 1928.]

P.U.R.1928E.

APPLICATION of a gas company for a certificate of convenience and necessity to construct and operate a distribution system in certain territory; authority granted in accordance with opinion and order.

Ing, Commissioner:

Statement.

This case comes to the Commission on the application of the Shippey, Maddin & Parish Gas Company for a certificate of convenience and necessity to engage in the business of buying, selling, and distributing natural gas in the counties of Jackson, Cass, Clay, Platte, Bates, and Vernon in the state of Missouri, and to the towns and cities in said counties that are not now receiving natural gas service. The application states, among other things, that the applicants are now furnishing gas to the cities and towns of Belton, Grandview, Martin City, and Raymore and has a franchise for the city of Pleasant Hill; that applicants intend to apply for franchises to furnish natural gas to the cities and towns of Liberty, Butler, Rich Hill, Drexel, Hume, and any other towns in the above described territory which are not now being supplied with natural gas. The application further states that the applicants have entered into a contract with the Missouri-Kansas Pipe Line Company to furnish natural gas to the applicants at the gates of each of the cities and towns herein mentioned, at the rate of 40 cents per thousand cubic feet for the first thousand cubic feet used each day in each city or town, 35 cents for the next one thousand cubic feet and 30 cents per thousand cubic feet for the balance of the gas used for domestic purposes, and a rate of 5 cents per thousand cubic feet as a carrying charge for all gas delivered by the Missouri-Kansas Pipe Line Company into any of said towns and cities for industrial purposes. The application further states that the applicants are fully able and capable of financing the furnishing of gas as herein set forth, and that the partnership is financially able to carry out the contracts that it has entered into and proposes to undertake.

This case was heard by a member of the Commission at the
P.U.R.1928E

Commission's hearing room at Jefferson City, Missouri, on the 28th day of June, 1928.

Facts.

The applicant is a partnership, the members of which are Frank P. Parish, C. S. Shippey, and S. J. Maddin, all of Kansas City, Missouri, and its principal office is at 820 Dwight Building, Kansas City, Missouri.

Mr. Parish stated that Mr. Shippey, his partner, has had more than thirty years' experience in the natural gas business; that his other partner, Mr. Maddin, is an experienced operator of both gas and oil properties, and that he, Mr. Parish, has charge of the finances and general management of the company. This partnership came into existence on February 1, 1928.

Franchises have been granted the applicant to engage in the gas distribution business in the cities of Pleasant Hill, Raymore, Belton, Grandview, and Martin City, and applications for franchises in the cities of Liberty, Butler, Rich Hill, Drexel, and Hume have been made to supply them with natural gas.

The applicant proposes to charge the consumers of gas in these cities the following rates:

For the first 500 cubic feet or less	\$1
" " next 1,500 " "	7¢ per hundred
" " 5,000 " "	5¢ " "
" " 13,000 " "	4½¢ " "
" " 10,000 " "	4¢ " "
" " 10,000 " "	3½¢ " "
" " 60,000 " "	3¢ " "
All over 100,000 " "	2½¢ " "

The applicant is paying to the Missouri-Kansas Pipe Line Company for the gas at the city gates at an average rate of 35 cents per one thousand cubic feet. The regular rate is 40 cents for the first thousand cubic feet used each day; 35 cents for the next thousand cubic feet, and 30 cents per thousand cubic feet for the balance of all the gas used. Then there is a rate of 5 cents per thousand cubic feet as a carrying charge for all gas delivered by the Pipe Line Company into any of said towns and cities for industrial purposes. Mr. Parish stated that the proposed rate compares favorably with the rates being charged for gas in communities similarly situated, and that there is a ne-P.U.R.1928E.

cessity for gas in all the communities, both for domestic and industrial purposes.

The testimony shows that the net worth of C. S. Shippey, S. J. Maddin, and Frank P. Parish, the partners composing the firm of Shippey, Maddin, and Parish Gas Company, is in excess of \$100,000 each.

Mr. Parish stated that the applicant is asking to supply Rich Hill, Hume, Butler, and Harrisonville but franchises have not yet been received by the applicant from said cities. Mr. Parish stated that the applicant has built and completed the distribution system in the towns of Grandview, Martin City, Raymore, and Belton, and that it is now supplying gas to the citizens of all four of said cities. The applicant begun supplying gas to the citizens of Belton in December, 1927, and gas service was first rendered to the citizens of Grandview, Martin City, and Raymore in June, 1928. Mr. Parish stated in explanation of the action of the applicant in constructing said distribution systems and supplying gas without the authority or consent of the Commission, that there was considerable confusion in formulating the plans for constructing the plants and that Mr. Shippey and Mr. Maddin came to Jefferson City and were told by someone to get their affairs in a more concrete shape before making application to the Commission, and by the advice of counsel application was deferred until the proposed plans were ready and the applicant knew what it was going to do, and that the plans have been formulated within the last month. Mr. Parish further stated that he understood that a certificate of convenience and necessity was required but that the willingness of the members of the partnership to spend their money under the circumstances would act as an evidence of good faith rather than the contrary, and that there was no intention of violating the rules and regulations of the Commission. He further stated that prior to the time he had consulted with his counsel in this proceeding, he did not know just how the matter was to be handled and that the only construction which was made prior to the filing of the application was done at the town of Belton, which was before Mr. Parish became a member of the firm.

Mr. Parish stated that the rates for service were determined
P.U.R.1928E.

upon before the franchises were voted upon by the people of the various towns and cities, and that the people were informed as to what the gas rate would be if the franchise was granted.

The applicant has secured a franchise to render gas service in the city of Pleasant Hill, but is not now rendering service.

The testimony shows that the approximate cost of the natural gas distribution plants now being constructed by the applicant will be as follows: At Belton, Missouri, \$21,000; Grandview, \$12,500; Martin City, \$5,000.

Conclusions.

[1] Some of the towns and cities which applicant proposes to serve with gas have already voted franchises for that purpose, and some of them are now receiving gas service. It would evidently be inconsistent for the Commission to issue an order authorizing the applicant to construct, maintain, and operate gas distribution systems in the towns and cities where gas distribution systems have already been constructed and are now being operated. The Commission will not grant authority to do that which has already been done, and while the Commission does not believe that the applicant wilfully and intentionally violated the law, it must recognize the fact that it has knowingly failed to follow the provisions of the law, either because of a mistaken idea as to the best way to show good faith or because of wrong advice. However, the people of the towns and cities which applicant seeks to serve with gas are entitled to gas service, and an error of the applicant should not be permitted to militate against them.

[2] In view of the provisions of § 72 of the Public Service Commission Law, the Commission will not undertake to grant certificates of convenience and necessity to the applicant applying to any town or city which has not voted a franchise authorizing the applicant to engage in the gas business in such town or city, the section above referred to being as follows:

"No gas corporation, electrical corporation, or water corporation shall begin construction of a gas plant, electric plant, or water system without first having obtained the permission and approval of the Commission. No such corporation shall

P.U.R.1928E.

exercise any right or privilege under any franchise hereafter granted, or under any franchise heretofore granted but not heretofore actually exercised, or the exercise of which shall have been suspended for more than one year, without first having obtained the permission and approval of the Commission. Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed in the office of the Commission, together with a verified statement of the president and secretary of the corporation, showing that it has received the required consent of the proper municipal authorities."

The Commission finds that the service is necessary and convenient to the people of said cities and towns, and it will, therefore, issue an order authorizing the applicant to construct, maintain, and operate a distribution system in the town of Pleasant Hill, and to continue to maintain and operate distribution systems in the towns of Belton, Grandview, Martin City, and Raymore.

An order in accordance with the views herein expressed will be issued. [Order omitted.]

Brown, Chairman, Hutchison and Porter, Commissioners, concur. Calfee, Commissioner, absent.

ILLINOIS COMMERCE COMMISSION.

POLO TELEPHONE COMPANY

v.

DEKALB-OGLE TELEPHONE COMPANY.

[No. 18169.]

Service — Telephone connections — Inadequate service.

A telephone company was required to provide an additional circuit along a route between two different exchanges where existing facilities were shown to be inadequate but the order was conditioned upon the action of the connecting company in installing a line to make connection with the circuit.

[September 12, 1928.]

P.U.R.1928E.

COMPLAINT by one telephone company against the abandonment of a certain toll line by another; line ordered to be restored.

By the Commission: On March 29, 1928, the Polo Telephone Company filed a complaint against the DeKalb-Ogle Telephone Company which was given the Docket Number 18169. An answer was filed by the DeKalb-Ogle Telephone Company on April 11, 1928. The matter came on for hearing at the offices of the Commission at Chicago on June 14, 1928. At the said hearing the Polo Telephone Company and the DeKalb-Ogle Telephone Company were each represented.

The subject matter of the complaint is the failure of the DeKalb-Ogle Telephone Company to rebuild a portion of a toll line extending from Oregon to Polo, which said line was damaged and put out of service by a sleet storm about a year ago. It appears from the evidence that there have been, until recently, two toll lines in operation between Polo and Oregon, and that each of the said toll lines was owned in part by the complainant and part by the respondent, each company owning substantially one-half of the line. One of these lines was put out of service, as hereinbefore stated, by a sleet storm and the Polo Telephone Company proceeded to repair the portion of the line owned by it but it is shown that the repairs were necessary in any event in order to maintain local service. The portion of the line owned by the DeKalb-Ogle Telephone Company was not restored to service.

The DeKalb-Ogle Telephone Company represents, in support of its position in the matter, that there is an existing toll circuit between its exchange at Oregon and the exchange of the complainant at Polo, that it owns 7.6 miles of the said circuit and the complainant owns 5.6 miles thereof, and that a toll is charged for messages from the Oregon exchange to the Polo exchange but that the complainant gives free service from the Polo exchange to the said Oregon exchange. Complainant has introduced evidence to show that the number of calls from Polo to Oregon is from five to six times as many as the average number from Oregon to Polo, due entirely, as the respondent represents, to the P.U.R.1928E.

fact that a toll is charged on calls in one direction but not for calls in the other direction. The respondent further represents that if a toll is charged upon calls from Polo to Oregon that the traffic over the toll line will be materially reduced.

The evidence indicates that the present facilities, consisting of a single metallic circuit, are insufficient for the proper handling of the present traffic between Polo and Oregon but that if the number of messages from Polo to Oregon were reduced to substantially the number handled in the reverse direction, the single toll line would be more than adequate to handle the traffic.

It is suggested by the respondent that the matter may be settled by the establishment of a toll charge from Polo to Oregon. The complainant indicates that it would not object to the establishment of such a charge and that if the business were thus reduced by the elimination of unnecessary calls so that the present toll line would be adequate to handle the traffic, the complainant would not press its demand for the rebuilding of the second line.

The Commission will give due consideration to any application that may be filed by the Polo Telephone Company for the establishment of a toll charge between Polo and Oregon but does not feel that an opinion or ruling in the matter can be stated in advance of the filing of such application.

The evidence now before the Commission establishes clearly that unless the traffic over the telephone line between Polo and Oregon is materially reduced that the present facilities are inadequate and that additional facilities are reasonably required for the convenience of the public. The record shows however, that such facilities are used by the subscribers of the Polo Telephone Company to a much greater extent than by the subscribers of the DeKalb-Ogle Telephone Company and that the said Polo Telephone Company offers to its subscribers, as part of the service paid for under its rate for exchange service, the privilege of communicating with Oregon free of toll charge. Under these circumstances and in the absence of any changes in rates or practices, it would appear that the cost of constructing a toll line for the purpose of increasing the facilities for the service referred
P.U.R.1928E.

to should not be borne entirely by the DeKalb-Ogle Telephone Company.

The respondent has introduced evidence to show that the cost to that company of installing an additional circuit along the old route which was abandoned would be approximately \$900, but that an additional line, if the same is necessary, could be constructed along the route of the present line for about \$600. If, however, the respondent installs an additional circuit on its present line it would be necessary for the Polo Telephone Company to build from its exchange to connect with the circuit thus added. This would appear to involve no substantial loss to the complainant inasmuch as the testimony indicates that the work done in restoring the old line was necessary to re-establish local service.

The Commission having considered the record herein finds that under existing operating conditions and practices the present facilities for telephone service between Polo and Oregon in Ogle county are inadequate and that it is reasonably necessary that additional facilities be provided.

The Commission further finds that the DeKalb-Ogle Telephone Company should be required to provide an additional circuit along the route of its present line between Oregon and Polo, but not until the Polo Telephone Company, petitioner herein, has installed or undertaken the work of installing a line to make connection with the circuit so to be installed by the DeKalb-Ogle Telephone Company.

The Commission further finds that jurisdiction of the case should be retained in order to permit modification of the terms of this order in the event that operating conditions and practices be changed through the filing and making effective of toll charges by the Polo Telephone Company or for any other reason.

INDIANA PUBLIC SERVICE COMMISSION.

RE ELWOOD WATER COMPANY.

[No. 9035.]

Valuation — Property paid for by consumers.

1. The value of services assigned to a water company by patrons
P.U.R.1928E.

who paid for them was excluded from the rate base of such utility, in view of representations made by the company in securing such assignment, that their value would not be so included in the capital account for rate-making purposes, p. 702.

Evidence — Specimen of water supply.

2. A sample of water drawn from a company's main was admitted as evidence tending to show that the supply was muddy and in such poor condition as to make it unfit for use, p. 703.

Service — Extension — Excessive cost — Water.

3. Testimony showing that cost of extensions to domestic consumers was excessive reaching as high as \$250 in special cases was received as evidence to show the reason for a limited number of subscribers as compared with other utilities in cities of similar size, p. 703.

*** Valuation — Cost of financing and acquisition.**

4. The cost of financing and acquisition by present stockholders of a water utility was not permitted to be included in a rate base, p. 704.

Valuation — Sold and unoccupied property — Water.

5. The value of two residences, one of which had been sold and the other unoccupied, was excluded from the appraisal of a water utility's property, p. 705.

Valuation — Property owned by another utility.

6. The value of a railroad switch owned and controlled by a railroad company was not permitted to be included in the appraisal of a value of water utility properties, p. 705.

Return — Amortization of rate case expense.

7. Expense of a rate proceeding by a water utility was ordered to be amortized over a four-year period, p. 705.

Depreciation — Organization and franchise expense — Water.

8. Items of organization and franchise were excluded from the make up of depreciable property of a water utility in view of a claim made by such utility that the assets represented by such amounts had no cash value for taxation purposes, p. 706.

Return — Percentage allowed — Water utility.

9. An increase of rates calculated to yield 6 per cent on the fair value of water utility properties was allowed, p. 706.

Depreciation — Percentage allowed — Water utility.

10. An allowance of 1 per cent was made on the depreciable value of water utility property as shown by company records, p. 706.

[August 17, 1928.]

APPLICATION of a water company for increased water rates; rates adjusted in accordance with opinion.

Appearances: Clyde H. Jones and D. M. Patrick, attorneys, for petitioner; H. M. Wilkey, for the city of Elwood.
P.U.R.1928E.

McIntosh, Commissioner: On July 19, 1927, the Elwood Water Company filed its verified petition alleging among other things that it was a corporation organized under the laws of the state of Indiana, and was a public utility within the purview of the Shively-Spencer Utility Act; and as such was, at said time and for several years previous thereto, the owner of and operating a water works plant and system in the city of Elwood, in the state of Indiana, that the present rates which it was allowed to charge for water in the city of Elwood were unreasonably low and not sufficient to meet its operating expenses, taxes, depreciation, and pay a fair return upon the value of its property used and useful. That the amount available for return and depreciation during the previous year was less than 3 per cent on the fair value of its said property, and in which petition it was alleged that it would be necessary to have an increase of its said rates in order that the revenues should be sufficient to pay it a fair return. Later, an amended petition was filed, asking for a slight increase over the original petition.

The Commission gave notice by publication as required by law, and written notice through the mail that the matters involved in said petition would be heard at the council chamber in the city of Elwood, December 19, 1927 at 10 o'clock A. M. At said time on said day the hearing was commenced and continued until the hour of adjournment, at which time said hearing was adjourned until the 23rd day of January, 1928, at 10 o'clock A. M., and on said day a further hearing of testimony was had until the hour of adjournment, and the cause not having been completed, a further hearing of evidence to be heard at the rooms of the Commission at the state house, Indianapolis, Indiana. That afterwards, by agreement of all parties, further evidence was heard at the state house in the city of Indianapolis, beginning March 7, 1928 and continuing until the hour of adjournment, at which time said cause was again adjourned for the further taking of testimony until April 6, 1928, said hearing to be held at the rooms of the Commission, and at which time the evidence in said cause was concluded.

At the hearing the Commission's appraisal and audit were in.
P.U.R.1928E.

troduced, and also an appraisal by Stone and Webster for the petitioner was introduced.

This appraisal by Stone & Webster shows a depreciated valuation of \$650,000. The appraisal carried properties which do not belong to the Elwood Water Company, such as railroad switch, and one dwelling which had been sold. The appraisal of Stone & Webster was incorrect, unreasonably high, and is, therefore, not accepted by the Commission as a basis for valuation.

The Commission's appraisal shows a reproduction value of \$429,810, and a depreciated value of \$329,529. The valuation of this property for taxation, 1927 and 1928, is \$136,105.

The income available for taxes, interest, and dividends as shown by the Commission's audit for 1926 and first six months of 1927 was \$12,061.11 and \$3,520.15 respectively. The operating expenses for the same period as shown by said audit were \$25,202.16 and \$14,622.05. Projecting the first six months of 1927, the operating expenses will be \$29,244.10, but the annual report filed with the accounting department of the Public Service Commission March 10, 1928, shows the actual operating expenses without depreciation to be \$30,569.74.

Depreciation accrued and charged to operating expenses during 1926 was \$1,500 and for the first six months of 1927, \$780.

It was apparent from the evidence introduced, including appraisal and accounting exhibits offered, that the Elwood Water Company is lawfully entitled to more revenue.

The Commission, after a careful study of the appraisal made by its engineers, and after considering all other influencing factors, such as the purchase and sale price of the common stock of the Elwood Water Company to the present owners, the property included that is really used and useful, omitting such property as is not useful, is of the opinion that a fair valuation for rate-making purposes is not less than \$300,000, which includes structural overhead, working capital, and going value.

It developed in the hearing that the price paid by the purchasers for the stock of said company was \$100,000, and the company had outstanding a bonded indebtedness of \$100,000.

[1] The Commission also took into consideration the fact that P.U.R.1928E.

approximately twenty-six thousands dollars in services were assigned to said water company. These were paid for by the patrons. Under the assignment contract, these services become the property of the water company. The patrons were not reimbursed for their expenditures for such services. It is included in the appraisal. The Commission believes this sum should be excluded from the rate base.

The Commission raises a question as to the method employed in securing the assignment of the services and notes that evidence was submitted at the hearing that the water company would not include this item in capital account for rate-making purposes.

Elwood has approximately the same population as Frankfort, Indiana, but the Frankfort Water Company has 3,407 consumers while Elwood had 1,808 at the close of the period December 31, 1927; therefore, the number of consumers at Elwood will gradually increase since the condition relative to services will be remedied.

The operating expenses for the Elwood Water Company increased from \$26,702.16 in 1926 to \$32,895.86 in 1927, an increase of \$6,193.70, and the Commission has considered this factor in arriving at a fair return for said company.

[2] The evidence introduced at the hearing by the City of Elwood tended to show that the service was often poor and at times the water was muddy and that it was in a very poor condition for use. A sample of such water drawn from the company's mains was on exhibition during the hearing and appeared unfit for any use.

The testimony of the keeper of the buildings and grounds of the public schools was to the effect that the water pressure was insufficient to furnish water on the second floor of the school building.

Persons getting water supply or applying for water supply testified that the water company demanded in some cases that the patrons pay for the extension of the main, also pay for the services from the main to the property line, and from the property line to the house.

[3] Testimony was offered showing that such expense, in some
P.U.R.1928E.

cases, reached as high as \$250 to the customer. As a result of such demands the water company shows an unusually low number of subscribers as compared with other cities of like size.

The Commission believes that the evidence in this hearing reveals to a great extent the reason for the limited number of subscribers. It also believes that with a proper adjustment of rates, the company paying for service connection to the property line from the main, that the number of subscribers will greatly increase, and that the revenues to the company will be very much greater.

This water plant was built, according to the evidence, in 1891. The present owner came into possession of this plant in October, 1926. Bills were rendered to the Union Traction Company by the Elwood Water Company for damage done to the water mains through the action of the electrolysis.

Stone & Webster's appraisal of the Elwood Water Company property reflects similar inflation of the values as noted in their valuation of the Vincennes Water Supply Company. The percent condition given by the Stone & Webster appraisal is entirely too high according to the evidence offered in this cause. Property was included in this appraisal which did not belong to the Elwood Water Company. Property was included in this appraisal which was not then used, and was not then useful. Estimates for labor costs and material costs seemed out of line and higher than the actual costs for these two items. For these and other reasons the Commission declines to accept the Stone & Webster appraisal as a proper and dependable evidence of fair value for rate making purposes.

[4] In answer to an inquiry by the Commission as to the cost to the present holders of the Elwood Water Compay of this plant, the following statement was submitted and signed by Benjamin Perk, secretary of the company, June 26, 1928:

Common stock, par	\$100,000.00
Outstanding bonds	100,000.00
Other liabilities	29,511.82
Costs of financing and acquisition	10,000.00
Additions to May 31, 1928	12,268.85

This makes a sum total of \$251,780.67
P.U.R.1928E.

The costs of the financing and acquisition should not be included in a rate-making base and is, therefore, excluded.

Other liabilities of \$29,511.82 is indefinite and does not conform to the evidence submitted in the hearing.

The outstanding bonds are the obligation of the corporation and are not assumed by the individuals who purchased the stock.

[5] The Commission's engineers omitted from their appraisal two residences valued at \$3,750, for the reason that one property has been sold on contract and the other was unoccupied and, therefore, not in use.

[6] The petitioner asks that a railroad switch be included in the Commission's appraisal, but the Commission refuses to recognize the ownership of said railroad switch by petitioner for the reason that said switch is owned and controlled by the railroad company.

In order to yield a fair return on a valuation of not less than \$300,000, a rate will be required which, after deductions for depreciation, taxes, and amortization of rate case expenses, would yield an approximate annual increase of \$15,513.64.

[7] The Commission believes that \$4,353.62 for rate-case expense is sufficient, and that it should be amortized over a four-year period. The rate case expense which is allowed by the Commission is as follows:

Commission's appraisal	\$672.13
Commission's audit	151.22
Advertising	30.27
Attorney fees, accounting, etc.	3,500.00
 Total	 \$4,353.62

The gross revenue of the Elwood Water Company under existing rates was for 1927 \$38,443.55. A schedule of rates is now to be fixed by the Commission which will yield an increase of \$15,513.64 per year. This is an increase of 37½ per cent in gross revenue. The Commission realizes that it is a big increase in rates and revenue to be borne by the citizens of Elwood. After having considered the evidence offered in the cause we believe this action is required. This will yield approximately six per cent on \$300,000. The petitioner insists that the basis upon which the Commission computes the depreciation is too low and

should include \$65,000 as an additional sum, allowed for organization expense and franchise in accounts of \$45,000 and \$20,000 respectively.

[8] The Commission has before it a statement signed by officers of the Elwood Water Company as of March 17, 1927, relating to the valuation of this water company for taxation purposes in which this statement is made and sworn to:

"Property and plant, \$229,355.91
Less — Item of good will arbitrarily included in above book figure of property and plant and which has no cash value for taxation purposes."

Net property and plant \$164,355.91.

The Commission, in the light of the facts refuses to include the items of organization and franchise to the extent of \$65,000 in the make up of depreciable property upon which 1 per cent per annum is to be allowed.

The evidence shows that in addition to the common stock purchased by the present water company, and the outstanding bond issue of \$100,000, that there was at the time of the purchase, outstanding indebtedness in accounts to the amount of \$14,275. This then would make a total consideration including all liabilities of \$214,275.

[9] The income is to be set up on a schedule of rates based on \$300,000. Considering the short time that the present owners have had possession of the plant, the amount paid for same, the amount proposed by them as a valuation for the purpose of taxation and appraisals made by utility engineers, the kind of service which said company is rendering to the city and citizens of Elwood, and the other influencing factors, it appears to the Commission that a rate of 6 per cent, or approximately 6 per cent on \$300,000 will be ample and adequate for the company, and as much as the citizens of Elwood should pay for the service given at the time of this hearing.

[10] It is therefore *ordered* by the Public Service Commission of Indiana, that the rate of depreciation for the Elwood Water Company shall be 1 per cent of the depreciable value of the property as shown by the company's records.

It is *further ordered* that the petition of the Elwood Water P.U.R.1928E.

Company to place in effect certain new and increased schedules of rates for service, as set out in the original and supplemental petitions filed in this cause, be and it is hereby denied.

It is *further ordered* that the Elwood Water Company is hereby authorized and directed to put into effect the following schedule of rates. [Schedule of rates and remainder of order omitted.]

Singleton, McArdle, Harmon, Commissioners, concur.

WISCONSIN RAILROAD COMMISSION.

RE VILLAGE OF CAMBRIDGE.

[U-3721.]

Rates — Meters — Necessity for metered service — Exceptions.

1. As a general practice all customers of a water utility should be metered, with the possible exception of those serviced from a small system and located on dead ended mains, particularly where the water distributed is impregnated with foreign matter which might affect the working parts of the meters, p. 709.

Rates — Meters — Classification of metered service.

2. Classification of water consumers as to who should and who should not receive metered service in a community with no sewer system was made by requiring meters for those customers having private sewers or other means of disposing of surplus water, as well as customers having water lifts or bath fixtures, except such of the latter as resided on dead ended mains where sluggish circulation of water impregnated with foreign substances was likely to interfere with working parts of the meters, p. 709.

[July 30, 1928.]

COMPLAINT by water consumers having metered service against alleged discrimination of rates; classification for metered service adopted in accordance with order.

By the **Commission:** Informal complaint having been made by Anderson Brothers and several other residents of Cambridge to the effect:

1. That there are only about twelve meters in the village;
2. That there are about one hundred other users of water whose service is unmetered;

P.U.R.1928E.

3. That some users not metered use as much or more water than those metered and are paying practically nothing for water;
4. That those metered are paying an unreasonable amount for water.

The Commission being satisfied, upon due investigation, that facts existed sufficient to warrant a further investigation and hearing with respect to said matter, a hearing was duly ordered and held on motion of the Commission on June 7, 1928 at Madison. The appearances were:

P. C. Westphal, for the village of Cambridge Water Department; B. A. Thronson, J. M. Poolt, Sanford Anderson, and C. E. Willber appeared as complainants.

At the time the existing rates for metered service were established no meters were in use and hence it was necessary to use average data obtained from analyses made in other investigations where complete data were available. The lawful rates of the Cambridge Municipal Water Department now in effect are as follows:

The village of Cambridge is charged for fire protection service the sum of \$941 per annum to cover the use of mains and hydrants up to and including the terminal hydrant and connection on each line of main existing on April 1, 1926.

For all extensions of fire protection service a charge of 8 cents per lineal foot of pipe shall be assessed per annum on the basis of length of main put into use between hydrants placed, plus a fixed charge of \$8 per hydrant set for each hydrant added to the system.

Drinking fountains—\$15 per annum.

Street flushing—\$25 per annum.

General Service.

Meter Rates.

First	10,000 gallons used in 6 months	Minimum charge
Next	15,000 " " " "	40¢ net per 1000
"	25,000 " " " "	25¢ " " "
"	50,000 " " " "	20¢ " " "
All over 100,000	" " " "	10¢ " " "

Minimum charge per 6 mos.—one customer—

½" meter	\$4.50
¾" "	5.50

1" "	7.00
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Additional customers on meter ...	2.50
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P.U.R.1928E.

*Unmetered Service.
Semi-annual charge*

Minimum charge per 6 months	\$3.25
Residence 1 faucet	3.25
Toilet .....	.65
Bath .....	.65
Hose per season	2.00
Stores, bakeries, meat markets, banks, offices, churches, restaurants, printing office, post office, one faucet	3.25
Additional fixtures .....	.65
Barber shop without bath or toilet	3.25
Barber shop with bath and toilet	6.50
Garages, until metered	3.90
Hotels, until metered	9.75
Stable, private, taken in connection with residence	1.95
Stable, private	3.25

Construction work—

Concrete streets 40 feet wide or less, per lineal foot	1¢
Concrete sidewalk per lineal foot	1¢
Concrete foundations per each 50 cubic yards	10¢
Brick, per M	5¢
Stone work, per 100 cubic feet	10¢
Plastering per 100 square yards or less	15¢

No permit issued for less than \$1.

We have made an analysis of the cost of supplying service for the year ended December 31, 1927 and for the six months' period ended June 30, 1928 and it was found that no change should be made in the charge for fire protection service. As regards general service, the cost of pumping and distribution (labor, supplies, and electric energy) averaged about 15 cents per thousand gallons. From the average cost per thousand gallons sold (including fixed charges) it appears that the second step in the schedule of rates for metered service should be reduced somewhat and the last step increased. An analysis of the water sold to each metered customer for the twelve months' period ended June 30, 1928 was made and it was found that the total revenues from such customers would be reduced somewhat through these changes. Rates for unmetered service should remain unchanged except that charges for service on dead ended mains should be modified somewhat and a rate established for water lifts.

[1, 2] An important question raised in this case is that of metering all flat rate water customers. As a general practice all customers, with the possible exception of those serviced from a small system and located on dead ended mains, should be metered. However, in Cambridge the water distributed is highly impregnated with lime and iron which may affect the working
P.U.R.1928E.

parts of the meters, it appears, necessitating more or less frequent overhauling. It is evident that mains at Cambridge must be flushed frequently to keep the water circulating in the outlying sections where dead ends exist. Inspection indicates that there are about fifteen customers on such dead ends that experience more difficulty than the average customer in securing water that is satisfactory. These customers, it is believed, should not be metered. There appears to be no question that the larger users, particularly the business places, should be supplied on a meter basis, and possibly residences having water lifts or a complete set of bath room fixtures, especially if connected to a sewer, septic tank or cess pool. Customers with none of the foregoing methods of disposing of surplus water usually find it difficult to waste water as extensively under a flat rate schedule as those connected thereto.

For the twelve months' period ended June 30, 1928 the records show metered customers used 1,601,609 gallons of water. From the record it appears that the impression prevails that the quantity to be consumed in the various steps in the schedule should be so arranged that more customers will reach the second or subsequent blocks. The aim has been in establishing rates to give the customers the largest quantity of water possible for the minimum charge which is usually established. Analysis indicates that the water sold metered customers at Cambridge is divided as follows:

First	10,000 gallons used in six months	244,584 gallons
Next	15,000 " " " "	278,363 "
"	25,000 " " " "	294,464 "
"	50,000 " " " "	367,675 "
All over 100,000	" " " "	416,523 "
Total sold		1,601,609 "

Analyses of metered sales of water to residences and small business customers in communities comparable to Cambridge, where there is no established sewer system, show that the average use of water per day will equal about 50 gallons, or about 9,125 gallons in six months. This is under the minimum allowance, of course. It appears reasonable to assume that unmetered customers in Cambridge will not use much in excess of the above
P.U.R.1928E.

amount, hence no material changes need be made in the rates for such service.

Classification of customers is a practical necessity. The line of demarkation between who should be metered and who unmetered in a community with no sewer system cannot always be clearly defined. Whichever of two classifications is applied, seeming discrimination in favor of one class and against another is quite likely to result. Separating customers into the two classes, however, can be done when there are reasonable grounds for the classification and it is not unjust or oppressive.

It is therefore *ordered* that the village of Cambridge as a water utility be and the same hereby is ordered to discontinue its present schedule of rates for metered water service and substitute therefor the following schedule:

First	10,000 gallons used in six months	Minimum charge
Next	15,000 " " " "	30¢ per 1,000 gallons
"	25,000 " " " "	25¢ " " "
"	50,000 " " " "	20¢ " " "
All over 100,000 " " " "	15¢ " " "	
Minimum charge per six months—one customer on a meter		
6" meter	\$4.50	
4"	5.50	
1" or larger	7.00	
Each additional customer on a meter	\$2.00	

It is *further ordered* that an inspection shall be made of all premises supplied with unmetered service and a complete list of fixtures in use by such unmetered customers, secured for billing purposes.

All unmetered customers having water lifts shall be billed \$2 each six months for each such appliance until metered.

Customers on dead ended mains shall be billed at two-thirds the existing flat rate charge per fixture used.

All other rates and rules not specifically mentioned herein shall remain unchanged.

It is *further ordered* that meters be installed on all services having a connection with a private sewer, septic tank, or cess pool and that have a complete set of bath room fixtures and a water lift, except such as reside on dead ended mains, where the flat rates provided above may be applied.

It is *further ordered* that jurisdiction in this case is retained
P.U.R.1928E.

for the purpose of issuing such supplementary order or orders regarding the installation of meters as may seem proper.

It is *further ordered* that the meter rates ordered herein shall become effective for service rendered subsequent to the first meter reading following the date of this order. Rates for unmetered service shall become effective at the expiration of the period for which advance payments have been made.

DISTRICT OF COLUMBIA PUBLIC UTILITIES COMMISSION.

RE WASHINGTON-INTERURBAN RAILROAD COMPANY.

[Formal Case No. 137, Order No. 715.]

Procedure — Matters considered at hearing — Rate increase — Uniform fares.

A proposal by a street railway at a Commission hearing for the purpose of considering changes in existing route and transfer arrangements between bus and traction lines, that the current free transfer arrangement be abolished and a 10-cent fare on the bus line authorized, as well as a 2-cent transfer charge from rail to bus was held not to be properly before the Commission inasmuch as no application for increase in fare had been received, and proper notice scheduling a hearing did not state that increased fares would be considered.

[July 9, 1928.]

APPLICATION of street railway and bus company for permission to abandon street railway lines; no action taken.

Amending Order No. 510.

By the **Commission**: After a formal public hearing held on March 19, 1923, for the purpose of considering the application of the Washington-Interurban Railroad Company to abandon and remove its tracks in Bladensburg Road from 15th and H streets to the district line, the Commission issued its Order No. 510, dated April 11, 1923, authorizing this company to remove its tracks, poles, and overhead wires from this thoroughfare. The Commission also authorized the company, in this order, to operate motor busses in lieu of street cars.

P.U.R.1928E.

The company, in its application for authority to remove the rails, poles, and overhead wires, stated that while it believed that there would be a charge of 2 cents for transfer between the street car and busses as heretofore authorized by the Commission in other cases, that it was willing to operate the busses for an experimental period of three months upon the then rate of fare, with a free transfer at 15th and H streets, northeast. The following is quoted from the application:

"If, at the end of the 90-day period or thereafter, results of the operation show a loss, the company to be under no obligation to continue operation except under such rates of fare or charges for transfers as may be necessary to prevent further losses."

The Commission, however, was of the opinion that the operation of motor busses in lieu of street cars with free transfers between the H street line of the Washington Railway & Electric Company and the bus line should be tried for a period of five years with free transfers issued between car line and bus line, and that such an arrangement would furnish adequate and convenient service to the public.

In this connection, the Commission stated:

"When the 5-year term approaches its close, this Commission will undertake to present to the public and to the company such a plan as will permanently best serve the interests of all concerned."

This period expired April 23, 1928, but due to the fact that the Commission was then considering a unification plan submitted by the traction companies and the Washington Rapid Transit Company, the Washington Railway & Electric Company, under date of April 3, 1928, requested the Commission to temporarily postpone consideration of the matter. When the Congress of the United States failed to approve the unification agreement as presented to the Senate and House district committees by the Commission, it became necessary for the Commission to again give consideration to the transfer arrangements between the Interurban Bus line and H street line and to determine whether or not any change should be made in the existing route of the bus line.

Accordingly, a formal public hearing was held on June 20,
P.U.R.1928E.

1928, after due notice. The notice scheduling this hearing read, in part, as follows:

" . . . This hearing is called for the purpose of considering whether any changes should be made in the existing route and transfer arrangements of the bus line of the Washington Interurban Railroad Company operating along Bladensburg road from the district line to 15th and H streets, northeast."

At this hearing, the company's representative submitted statements showing the result of operation in the District of Columbia of the bus line of the Washington Interurban Railroad Company over the 5-year period of trial operation. These exhibits were supported by testimony showing that the line had been operated at a considerable loss, and the Commission was requested to abolish the present free transfer arrangement and authorize a 10-cent fare on the bus line with a free transfer to the H street line of the Washington Railway & Electric Company and to also authorize a charge of 2 cents for a transfer from the rail line to the bus line only upon the payment of an 8-cent cash fare.

Inasmuch as no application for an increase in fare had been received and the notice scheduling the hearing did not state that it was to be held for the purpose of considering a fare increase, the Commission is of the opinion that the verbal request of the company, presented for the first time at the hearing, was not properly before it. No suggestions were made at the hearing for changes in routeing or transfer arrangements other than the request of the company to be permitted to charge two cents for transfers, which request, however, was coupled with the request for an increase in fare.

INDIANA PUBLIC SERVICE COMMISSION.

RE LOGANSPORT HOME TELEPHONE COMPANY.

[No. 9021.]

Valuation — Ascertainment of fair value — Factors.

1. The Commission gave consideration to the cost of reproducing P.U.R.1928E.

telephone properties at prices for materials and labor prevailing at the time of the inquiry, less depreciation, with such weight as might appear proper to other evidence concerning the value of the property, p. 720.

Valuation — Unit costs — Tariffs.

2. An estimate of unit costs by comparisons with construction of companies in various states and in Canada was held to be less reliable than an estimate of the Commission's engineer based on the experience of companies of similar size operating under similar conditions within the same state, p. 721.

Valuation — Economies by utility — Favorable lease.

3. The ratepayers should not be compelled to pay a return upon the difference between a so-called favorable lease by the utility and an alleged fair rental on the property at prevailing prices, p. 721.

Evidence — Expert's testimony — Intangibles.

4. The testimony of a witness qualifying as an expert which failed to give proper weight to proper intangible elements of utility valuation was regarded as of doubtful value, p. 723.

Apportionment — Allocation of telephone plant — Area of system.

5. An allocation of a particular exchange as a separate entity instead of a part of a general telephone system was held to be inaccurate where the other exchanges, not isolated and bearing a direct relation to each other, were all located in the same county, p. 724.

Valuation — Structural overheads — Telephones.

6. An allowance of approximately fifteen per cent for structural overheads was made in the reproduction cost valuation of telephone utility property, p. 725.

Valuation — Going value — Telephones.

7. An allowance of slightly more than 10 per cent on depreciated value of physical property of a telephone company was made for going concern value, p. 725.

Depreciation — Percentage allowed telephone company.

8. An allowance of 5 per cent per annum on the book cost of the depreciable property of a telephone utility was made for depreciation charge, p. 725.

Return — Operating expenses — Rate case expense.

9. The employment of three firms of attorneys and two firms of engineers was held to be excessive aid and expense in the preparation of a rate case by a telephone utility having a rate base of \$715,000, p. 726.

Return — Present value — Telephones.

10. Increased rates were allowed calculated to yield a return in excess of 7 per cent for a telephone utility, p. 727.

[August 6, 1928.]

PETITION by a telephone utility for increased rates for service; rates adjusted.

P.U.R.1928E.

Appearances: W. H. Thompson, M. L. Fansler, Perry E. O'Neal, J. S. Powell, for the Logansport Home Telephone Company; Thomas C. Bradfield, City Attorney, John S. Lairy, Dr. John Bauer, R. C. Hillis, for the city of Logansport.

Ellis, Commissioner:

History of the Case

On July 6, 1927, the Logansport Home Telephone Company filed with the Public Service Commission of Indiana its petition for authority to increase exchange rates at Logansport, Walton, Galveston, Lucerne, Young America, and New Waverly. Said petition, omitting caption and signatures, is as follows:

"Comes now the Logansport Home Telephone Company and respectfully shows to the Commission as follows:

"1. That petitioner is a corporation organized under the laws of the state of Indiana having its principal office and place of business at Logansport, Indiana, and is a 'public utility' within the purview of the Shively-Spencer Utility Act, and is engaged in furnishing telephone service to the public in the city of Logansport and the towns of Walton, Galveston, Lucerne, Young America, and New Waverly, and generally in Cass county, Indiana.

"2. That since the 1st day of April, 1921, there has been in effect for the property of your petitioner at Logansport, Walton, Galveston, Lucerne, Young America, and New Waverly, certain schedules of rates and charges for telephone service supplied by your petitioner at its said exchanges, which schedules of rates and charges petitioner was authorized and directed to charge and collect by an order of the Public Service Commission of Indiana, dated March 1, 1921, and by schedules heretofore filed by said utility with said Public Service Commission, copies of which said schedules are attached hereto as a part of this petition, marked Exhibit 'A.'

"3. That the income which your petitioner has received under such schedules of rates now in effect at each of said exchanges, and which your petitioner reasonably may expect to receive under said rates, has not been and will not be sufficient to pay P.U.R.1928E.

operating expenses and a fair return upon the fair value of the petitioner's property used and useful at said respective exchanges, and upon the fair value of the used and useful property of your petitioner employed in the service of the public at all of said exchanges; that said rates are inadequate, unjust, unreasonable and confiscatory, when considered separately or when considered in their entirety.

"4. That the several exchanges of your petitioner in Cass county, Indiana, comprise one telephone system, having approximately 6100 stations.

"5. That the entire income of your petitioner during the year 1926 from all sources under rates then in effect was insufficient to pay operating expenses and a fair return upon the entire property of said petitioner used and useful in the service of the public in Cass county, Indiana.

"6. That by reason of the inadequate rates now in effect at the several exchanges of your petitioner in Cass county, Indiana, your petitioner is unable to realize sufficient earnings to attract and secure the capital necessary for additions and extensions and will be unable to realize revenue sufficient to continue to maintain the standard of service which the public demands and which it is the desire of petitioner to supply.

"7. That for the reasons stated, your petitioner has established schedules of exchange rates for services to be rendered by the petitioner at its Logansport, Walton, Galveston, Lucerne, Young America, and New Waverly exchanges, and has filed certain schedules with this Commission to become effective thirty days from the date of the filing thereof, and on approval thereof by this Commission. A copy of such schedules is filed herewith as a part hereof, marked Exhibit 'B'; that said rates are just and reasonable and not discriminatory.

"Wherefore your petitioner asks the Commission to approve the rates, tolls, and charges set out in said Exhibit 'B,' and that the same may become effective thirty days from the filing thereof, and upon approval by the Commission."

This cause was set for hearing at the City Hall, Logansport, Indiana, February 14, 1928, and notice was given to all inter-P.U.R.1928E.

ested parties. The hearing was held at the time and place above indicated. Further hearings were held in this matter at the state house, Indianapolis, Indiana, February 17, 1928, February 18, 1928, March 5, 1928, April 27, 1928, and April 28, 1928.

It was agreed that briefs be filed by the petitioner and respondent, and a time was fixed for the filing of such briefs with the Commission. Briefs were filed with and have been considered by the Commission in connection with its decision in this cause.

Immediately upon the filing of the original petition, the Commission directed its engineering department to make a detailed appraisal of the property and its accounting department to make a complete audit of the books of the petitioner. Some time was required for the preparation of such appraisal and audit and the same were completed and submitted in evidence at the hearing.

At the hearings in this cause, Exhibits were submitted and admitted in evidence as follows: [Exhibits omitted.]

Points of Similarity with Cause No. 9023.

This cause has so many points of similarity to Cause No. 9023, being in the matter of the petition of the Steuben County Telephone Company for authority to increase rates, that the Commission deems it advisable to call particular attention to them.

The ownership of the property is substantially the same. Only seven days intervened in the filing of the petitions. Three firms of attorneys were hired in each case, and these were the same attorneys, with the exception of local attorneys in Angola and Logansport who necessarily would not participate in both cases.

The same engineers made the appraisals for the company and the same second engineer made a perfunctory inspection of the property to determine per cent condition.

The same firm of accountants was employed. Finally, but not least important, in both instances the petition for increase in rates follows a change in ownership of the properties.

It should be borne in mind that the matters involved in the Steuben County Telephone Case were adjudicated in the United States District Court for the Southern District of Indiana, in Cause No. 1136, in equity, and in so far as pertinent, the Com-P.U.R.1928E.

mission will follow the decision of the Federal Court in that case as a measure in the instant case.

Valuation

The petitioner submitted in evidence a detailed appraisal of the property made by J. G. Wray & Company, engineers of Chicago, Illinois, as of August 1, 1927. This appraisal, as originally prepared, placed the cost of reproduction new of this property at \$1,068,794, and the cost of reproduction depreciated at \$932,245 both figures including going value and working capital.

At the time of the introduction of the appraisal in evidence Mr. J. G. Wray testified that the total should be reduced by \$16,308.87 in order to give effect to a new opinion as to the value of a so-called favorable lease and to correct errors in the pricing of protected aerial cable terminals. Later corrected summary sheets were submitted by Mr. Wray purporting to give effect to these adjustments. The engineer testified that, in his opinion, the fair value of this property, as of August 1, 1927, is at least \$900,000.

Mr. Earl Carter, who, at the time of the hearings in this matter was chief engineer of the Public Service Commission, and who had direct charge and supervision of the making of the detailed inventory and appraisal of the property by the engineering department of the Commission, testified that on a January 1927 price basis, with an inventory as of August 1, 1927, the cost of reproduction was \$777,581 and the cost of reproduction depreciated \$640,044. On an estimated original cost basis, Mr. Carter placed the cost of reproduction at \$676,083. The Carter figures include a 15 per cent allowance for structural overheads, but do not include going value or working capital other than materials and supplies.

At the final hearing in this matter Commission engineers testified concerning adjustments which would result in the Carter figures on the cost of reproduction and the cost of reproduction depreciated by giving effect to certain changes in prices between January 1927 and April 1, 1928. This testimony showed that there has been an increase in pole prices and in labor and a de-

P.U.R.1928E.

crease in cable prices, which, in dollars, virtually off-set each other, so that there would be virtually no change in the total figures of the Carter appraisal, as of April 1, 1928.

Dr. John Bauer, an economist, of Montclair, New Jersey, who was employed by the respondent, city of Logansport, presented an estimate showing the value of the property as of August 31, 1927 to be \$516,000. This valuation was arrived at, broadly speaking, by taking the book cost of the company's property, deducting a figure on account of reserve for accrued depreciation, and adding one-half of the capital stock investment made prior to the change in the level of telephone prices.

The evidence showed that the 1927 tax assessment of this property was \$374,616.

Certain exhibits were introduced by the petitioner to show the property and plant value on the basis of index figures.

[1] In arriving at the present value of the property of the Logansport Home Telephone Company, the Commission will give consideration to the cost of reproducing the same property now at prices for materials and labor prevailing at the time of the inquiry, less depreciation, with such weight as may appear proper to other evidence concerning the value of this property.

1. Wray Appraisal.

The Wray appraisal, in the opinion of the Commission, has been built up by the use of unit costs not applicable to Logansport, by the inclusion of unwarranted overheads and extravagant intangibles and by the capitalization of improper items to a figure far in excess of the present fair value of this property.

Out of the total Wray valuation of more than \$900,000, a total of \$360,224 or almost as much as the entire tax value of this property is made up of overheads and intangible items. This figure included about \$113,000 included in the so-called direct charges to cover supply expense, plant supervision and tool expense, voucher expense, engineering and general. Then there is the 15 per cent for overheads amounting to \$117,217, \$120,000 for going value, and \$10,000 for working cash capital.
P.U.R.1928E.

These overhead charges and intangible items, in the opinion of the Commission, are excessive, and the evidence does not warrant their inclusion in this amount in the fair value of this property.

[2] The unit costs used in the Wray appraisal, according to the testimony of Mr. Wray, have been built up on data obtained by the Wray engineering organization of construction costs for telephone properties in various places in the United States and Canada with little or no effect given to actual construction costs in Indiana. Although at first including an Indiana company in the list of those named as forming the basis for the unit prices used; Mr. Wray admitted that he had before him no Indiana data except certain experiences of the Indiana Bell Telephone Company. The unit costs of Wray, according to the evidence, reflect the cost of telephone construction in Minnesota, New Jersey, New York, Rhode Island, Ohio, and Ontario, and Quebec, both in Canada, with some data of the British Columbia Telephone Company, rather than actual construction costs in the state of Indiana in cities and towns with telephone systems comparable to that of Logansport. In this connection it must be borne in mind that the unit prices used by Commission engineers in connection with the preparation of that appraisal are the result of experience with hundreds of telephone plants in the state of Indiana and of a number of exchanges comparable with Logansport.

The original appraisal prepared by Mr. Wray contained an item of \$24,877 representing the alleged present value of the annual saving of \$3380 due to a so-called favorable lease for ten years, interest at 6 per cent compounded annually.

[3] This was included in the Wray appraisal on the theory that the central office building is not owned by the company but that the company has a so-called favorable long-term lease on the building with ten years yet to run at a rental of \$1000 per annum and that a fair present annual rental is \$4380. At the time of the hearing Mr. Wray corrected this item making it \$14,850 on the assumption that the present fair annual rental for the building is \$3000 per year instead of \$4380 and that
P.U.R.1928E. 46

the difference of \$2000 between the \$1000 the company pays and the \$3000 estimate should be capitalized on the theory outlined above.

The Commission cannot concur with the reasoning which would require the ratepayers of the company to pay a return upon a \$14,850 because the company has been able to negotiate a lease for its central office building at a favorable figure, even if it were true that the rental paid under the terms of the lease is favorable, although evidence of competent witnesses introduced by the respondent, city of Logansport, indicates that the \$1000 annual rental charge under the terms of the lease is a fair and reasonable charge and is not in any respect favorable to the company. This so-called favorable lease, it must be borne in mind, is carried as an item of inventory in the Wray appraisal and carried along with items of physical property as if it were such.

The company engineer was subjected to a searching cross-examination by Dr. Bauer, representing the respondent. A careful examination of the record, in the opinion of the Commission, shows that in many instances, the company engineer failed properly to substantiate his appraisal when on the witness stand.

Mr. Wray testified that in arriving at his fair value of \$900,000 for this property he had taken into consideration other things in addition to his appraisal on the basis of cost of reproduction depreciated. When viewed in the light of the Wray appraisal figure on the cost of reproduction depreciated, however, it appears evident that the company engineer has given little or no weight to any factors in determining his judgment of the fair value of the property except his own appraisal as to the cost of reproduction depreciated.

2. Bauer Estimate.

The Commission permitted the widest latitude in the introduction of evidence both oral and in Exhibit form by Dr. Bauer, the economist employed by the respondent city of Logansport. All objections of the company to the admissibility of this testimony were overruled and every opportunity given to the witness to present in the greatest detail and in his own way his testimony as to the fair value of this property and other matters.

P.U.R.1928E.

[4] The Bauer estimate of fair value, namely, \$516,000, was arrived at by the use of what may be termed a formula, which, in the opinion of the Commission, is not applicable to the instant case. This valuation amounts to approximately eighty-five dollars per station, which, on its face, appears too low for this type of property. The evidence shows that in arriving at this figure the witness failed to give proper weight to the intangible items of going value and working capital. The value found by Dr. Bauer was arrived at without any consideration of inventory or appraisal of the property and no such work has ever been done by the witness in connection with this or any other property, as shown by the record as follows:

Q. Did you ever make an inventory or appraisal of a telephone plant?

A. Never. . . .

Q. And you have made no inventory and appraisal of the property of this company?

A. No, sir.

In this connection the Commission will call attention to the decision of the United States District Court of Colorado, Westinghouse Electric & Mfg. Co. v. Denver Tramway Co. 3 F. (2d) 285, P.U.R.1925B, 156, 176. This decision discussed at some length the testimony of one Doctor Delos F. Wilcox, an economist, who represents the city in the proceedings had in that matter. It appears from the opinion of the Court that Dr. Wilcox predicated his testimony upon certain information from the books of the company and upon his own judgment and opinion as to other matters. The opinion says:

"In so far as he testified as to what the books of the tramway company, or predecessor companies, disclosed as to cost of property when installed, he was competent. That was not expert testimony. And if the cost of all property in existence at the time of this appraisement had been shown by the books its materiality, along with other evidence, in ascertaining a fair value would not be doubted. But in a large part they do not show that cost, and the witness in making up his so-called normal or historical valuation, resorted to methods requiring the use of his judgment, and as to that I think he had not been shown com-P.U.R.1928E.

petent to speak. His nonexpert testimony is so modified, enlarged, or restricted by his personal opinion as to render the two inseparable, and each is valueless."

The respondent introduced in evidence certain exhibits purporting to indicate the proportion between the entire company and the Logansport exchange. These exhibits were prepared by Dr. Bauer, and were intended to support the contention of the respondent that the Logansport exchange in itself is a profitable enterprise and that no increase in rates should be ordered for this exchange. The allocations of property and other items were made by Dr. Bauer in accordance with his ideas as to the correctness of such allocations.

[5] The Commission is not convinced that the allocations made in the respondent's exhibits are accurate. Furthermore, it is not impressed with the position that the Logansport exchange of this company should be considered as a separate entity instead of a part of the telephone system of the petitioner. The exchanges of this company are not isolated and bear a direct relation to each other and are all located in the same county; and the valuation of the property and the consideration of the revenues and operating expenses and other items, should be made on the basis of the company as a whole instead of on the basis of the various exchanges operated by the company. In considering the matter from this viewpoint, however, there should be as far as possible, an equitable distribution of the rate requirements among the various exchanges.

3. Commission Appraisal.

The appraisal of this property made by the engineering department of the Commission was made under the direction of Mr. Earl Carter, a graduate engineer, with many years' experience in appraising telephone and other utility properties in the state of Indiana. The engineering staff of the Commission, as shown by the record, arrived at appraisal figures by using unit prices which are certainly applicable to the Logansport situation. While made upon a January 1927, spot price basis with an inventory as of August 1, 1927, the evidence shows conclusively that giving effect to April 1928, prices would make little or no differ-

P.U.R.1928E.

ence in the totals arrived at in the appraisal on the basis of cost of reproduction depreciated.

4. Fair Value.

[6, 7] The Commission appraisal gives the cost of reproduction depreciated for this property as \$640,044. This figure includes 15 per cent for structural overheads, amounting to \$81,048, and \$18,675 for materials and supplies. This amount for materials and supplies is rather high for a property of this size. Allowing \$65,000 for going value (slightly more than 10 per cent on the depreciated value of the physical property) and \$10,000 for working cash capital, gives a total figure of \$715,044.

After a careful consideration of all the evidence submitted, including the appraisal submitted by the company engineer, the Commission finds that the fair value for rate-making purposes of the Logansport Home Telephone Company, including going value and working capital, is \$715,000.

Depreciation

[8] The Commission has considered the evidence as to a proper allowance for depreciation and is of the opinion, after a consideration of the various classes of depreciable property, that a composite rate of 5 per cent per annum on the book cost of its depreciable property should be established at a proper depreciation charge, and it is the opinion of the Commission that the same is a liberal allowance.

Rate Case Expense

The company has submitted a claim for rate case expense amounting to the sum of \$18,466.58. Itemized, as shown by the record, this amount includes the following:

Attorney's fees (Firm #1)	\$4,000.00
Attorney's fees (Firm #2)	2,000.00
Attorney's fees (Firm #3)	1,000.00
Engineering fees (Firm #1)*	10,033.11
Engineering fees (Firm #2)	500.00
Accountant's fees	750.00
Miscellaneous appraisal expenses	183.47

* This item is further itemized showing an engineering charge of \$6,716.58, "which is brought over from 1926," and \$3,316.53 at a later date.
P.U.R.1928E.

[9] The Commission does not believe that it was necessary to employ three firms of attorneys adequately to present the case of the petitioner. It naturally follows, therefore, that the Commission cannot approve as a charge to operating expenses the full amount of \$7000 for attorney's fees in this cause. The Commission cannot see the necessity of employing two engineers to do appraisal work in order adequately to present the case of the petitioner, and the Commission will not allow as a charge to operating expenses the full amount of \$10,716.58 for engineering fees. The accounting fee of \$750 seems reasonable to the Commission.

In connection with the consideration of the reasonableness of the Wray charges for engineering service, the Commission will call attention to certain circumstances in connection with the preparation of the Wray appraisal. The Commission is informed by its engineering department that when the Commission engineers checked over the original Wray appraisal many mathematical errors in the computations were discovered. Furthermore, the Commission engineers discovered that certain property had been omitted from the Wray appraisal. For example, an omission of approximately one hundred twenty-five miles of copper wire in the city of Logansport had been made in the appraisal. These discoveries were followed by an entire repricing of the inventory by the company engineer. Certainly if all of the engineering work had been done at one time the charges would have been less than those claimed by the company engineer.

In considering the reasonableness of the rate case expense claimed by the petitioner, the Commission, in addition to exercising its own judgment, will attempt to make its findings in harmony with the decision of the United States District Court for the Southern District of Indiana in the Steuben County Telephone Company Case, referred to previously in this order.

It may be pointed out that while the hearing in the Steuben County Case lasted only one day, that it required several days to complete the taking of testimony in the instant case. At first blush it might appear that due to the additional time spent in P.U.R.1928E.

the hearing that a considerably larger allowance for rate case expense should be made in the instant case. However, the total amount of rate case expense of \$18,466.56 was claimed by the company in an exhibit submitted on the first day of the hearing in this cause within a few hours after the beginning of said hearing at a time when no one knew the exact time which would be required to complete the case. This occurred at the hearing held in Logansport on February 14, 1928. The same total of \$18,466.56 was itemized by the company in testimony at the next to the last day of the hearings in this matter, namely, April 28, 1928, and no additional claims were submitted at that time. It appears, therefore, that the fees claimed were for the case regardless of the amount of time consumed in hearings. Considering the amount of rate case expense allowed by the Federal Court in the Steuben county case, and considering the unusual circumstances in connection with the making of the appraisal in the instant case, the Commission is of the opinion and finds that \$10,750 is a fair and reasonable allowance for rate case expense to be paid by the company to its engineers, accountants and attorneys, which may be amortized over a period of four years and charged to operating expenses.

Rates

The Commission will deny all of that portion of the petition in this cause setting out a proposed schedule of rates, and finds that said proposed rates are unreasonable, excessive, and too high to meet the requirements and produce a fair return on the fair value of the property.

[10] The Commission will authorize a new and increased schedule of rates, which will produce in excess of a 7 per cent return upon the fair value of \$715,000 found in this order, after making an allowance for all necessary operating expenses, depreciation, and amortization of rate case expense.

In arriving at the requirements of the company, the Commission has given effect to the increased scale of wages now being paid the employees of the company, to increase local and income taxes, and has computed the depreciation at 5 per cent on the P.U.R.1928E.

value of the depreciable property as of June 30, 1928. Allowance has also been made for regrading of subscribers stations in accordance with the evidence submitted in this cause.

McCardle, Harmon, McIntosh, Commissioners, concur; Singleton, Commissioner, concurs, except in rate of depreciation.

WEST VIRGINIA PUBLIC SERVICE COMMISSION.

RE CLARKSBURG LIGHT & HEAT COMPANY.

[Case No. 1742.]

Evidence — Rates not under attack.

1. Evidence as to the validity or reasonableness of a past rate schedule not under attack is inadmissible, p. 729.

Evidence — Cumulative evidence — Valuation.

2. Evidence as to market value of utility property which is merely cumulative of like evidence introduced in original proceedings is objectionable, p. 729.

Return — Operating expenses — Federal income tax.

3. Taxes actually paid by a public service corporation are a legitimate charge against operating costs, including Federal income taxes, p. 735.

[June 22, 1928.]

PROCEEDINGS upon investigation and suspension of rates, rules and regulations for furnishing natural gas; increased rates of service allowed.

Upon Rehearing.

By the Commission: This proceeding is upon a rehearing of the order made December 23, 1927, 2 P. S. C. W. Va. Decisions, 611, P.U.R.1928B, 290, whereby the natural gas rates of the respondent were fixed at 50 cents per thousand for the first 2,000 cubic feet consumed per month by consumers other than industrial plants, and 35 cents per thousand for all other gas sold. The respondent declined to exercise the authority granted it by the order to put the above rates in effect. Instead, it filed a petition for rehearing, and has continued to furnish natural gas at the rates heretofore in effect as follows: to domestic consumers at 30 cents per thousand for the first 30,000 cubic feet per month, P.U.R.1928E.

33 cents for the next 10,000 cubic feet per month, and 38 cents for all over 40,000 cubic feet; to manufacturers and industrial consumers at 40 cents per thousand cubic feet; and to municipalities and public buildings at 21 cents per thousand.

The rehearing was granted on the showing that the consumption of gas has so fallen off since the year 1926 (the last period for which data was submitted to the Commission in the original case), that the prescribed rates will not enable the company to operate successfully. Testimony was taken and numerous exhibits and documents filed on March 5, 1928, and April 9, 1928, the Commission's statistician made and filed an audit of the respondent's books for 1927, supplementing the audits to that year, oral arguments were made May 3, 1928, and written memoranda of argument were filed, by the respondent May 9, 1928, by the protestants May 15, 1928, and replies on May 21 and 24, 1928.

[1, 2] The respondent offered in evidence what purported to be all the franchise ordinances under which it has been supplying gas to the public since its incorporation, as well as copies of orders made and reports filed by this Commission authorizing the charges for natural gas exacted by the respondent since the creation of the Commission in 1913, for the purpose of showing that its rates in the past have been lawfully made. Objections were made by the protestants to the consideration of this evidence. We have sustained these objections because no attack has been made upon the lawfulness of any rates collected by the respondent company, either before or since the creation of this Commission, and because the findings and conclusions reached in this case by the Commission do not assume that any unlawful or illegal rates have in the past been charged or collected by the respondent. Evidence was also offered concerning the market value of the respondent's gas wells and operated gas territory, to the consideration of which the protestants objected. This objection also has been sustained. The value of the respondent's plant is not in issue in this proceeding upon rehearing; and, if it were, the evidence offered and rejected is merely cumulative of much like evidence introduced in the original case, which was discussed in the report of the Commission filed December 23, 1927, *supra*. The fair value of the respondent's plant has been fixed at \$2,000,-
P.U.R.1928E

000, and the sole question to be determined in this present proceeding is what rates for natural gas the public is legally required to pay to enable the respondent to discharge its public service duty of supplying gas.

The Commission's Estimate.

The Commission's estimate of the annual revenue upon which was made the order of December 23, 1927, *supra*, was calculated on sales of gas equal to those in 1926, and at 50 and 35 cents per thousand cubic feet, as follows:

232,344 M cu. ft., domestic	@ .50	\$116,172.00
1,403,254 M cu. ft., domestic	@ .35	491,138.90
1,635,598 M cu. ft.		\$607,310.90
1,074,581 M cu. ft., industrial	@ .35	376,103.35
89,982 M cu. ft., affiliated company	@ .35	31,493.70
2,800,161 M cu. ft.		\$1,014,907.95
Discounts forfeited		5,510.43
Miscellaneous		3,415.78
Total expected revenue		\$1,023,834.16

The annual operating charges were likewise based on the costs of operation in 1926, including an allowance for depreciation and amortization and for rate case expense, as follows:

General operating expense (1926)	\$333,269.22
Gas purchased, 1,596,898 M cubic feet (1926)	438,463.36
Taxes (1926)	50,334.68
Commission expense amortization	3,200.00
Depreciation and amortization	40,000.00
Total operating charges	\$865,267.26
Balance for return, 7.9 per cent	158,566.90
	\$1,023,834.16

The records of the company, and the testimony, disclose, however, that during the year 1927 its sales of gas to domestic and commercial consumers declined from 1,635,598 M cubic feet in 1926 to 1,436,717 M cubic feet in 1927, sales to manufacturers declined from 1,074,581 M cubic feet to 873,989 M cubic feet, and sales to affiliated concerns declined from 89,982 M cubic feet to 62,737 M cubic feet, and that it would have been unable because of the isolated location of the wells from which gas is sold
P.U.R.1928E.

to affiliated companies to sell the last mentioned quantity at 35 cents per thousand.

And, while the company's sales fell off 426,718 M cubic feet in 1927, its purchases also were less than in 1926 by 317,325 M cubic feet.

The end of the year 1927 showed the poorest year's business the company has had since 1921, even miscellaneous credits shrinking the sum of \$1,899.99; but applying to 1927 sales the rates authorized by the Commission, would have resulted in a net income of \$123,623.86, or more than 6 per cent on a valuation of \$2,000,000. The figures are as follows:

<i>Revenues.</i>		
227,210 M cu. ft., domestic	@ .50	\$113,605.00
1,209,507 M cu. ft., domestic	@ .35	423,327.45
1,436,717 M cu. ft., domestic		\$536,932.45
868,109 M cu. ft., industrial	@ .35	303,838.15
5,880 M cu. ft., industrial	@ .35	2,058.00
*62,737 M cu. ft., affiliated company	@ .35	21,957.95
2,373,443		\$864,786.55
Discounts forfeited		5,134.60
Miscellaneous		1,901.53
Total revenues		\$871,822.77
<i>Expenses.</i>		
General operating expenses		\$338,125.99
Gas purchased, 1,279,573 M cu. ft.		318,721.73
Taxes		48,151.19
Commission expense amortization		3,200.00
Depreciation and amortization		40,000.00
Total operating charges		\$748,198.91
Balance for return, 6.1 per cent		123,623.86
		\$871,822.77

* Sales to affiliated company at 25 cents per thousand, instead of 35 cents, would reduce revenues by \$6,273.70, leaving balance for return \$117,350.16, and this sum would be boosted to \$119,240.15 if miscellaneous credits in 1927 had equalled those of 1926. However, the United States Supreme Court has set aside an order of this Commission authorizing rates that yielded but 6 per cent on the value of a public service plant, holding that such a return is confiscatory and constitutes the taking of private property for the use of the public without paying a just compensation therefor. Bluefield Water Works & Improv. Co. v. Public Service Commission, 262 U. S. 679, 67 L. ed. 1176, P.U.R.1923D, 11, 43 Sup. Ct. Rep. 675.

Actual Revenues 1927.

While the operating charges for 1927 were \$748,198.91, the P.U.R.1928E.

revenues actually earned from the sale of gas at the old rate schedule were \$805,856.26, a net income of \$57,657.35. The revenues were as follows:

1,395,334 M cu. ft., domestic 41,383 M cu. ft., public	@ .30 plus @ .21	\$424,493.92 9,047.35
1,436,717		\$433,541.27
868,109 M cu. ft., industrial 5,880 M cu. ft., miscellaneous 62,737 M cu. ft., affiliated	@ .40 @ .40	347,242.96 2,351.56 15,684.25
2,373,443		\$798,820.04
Discounts forfeited		5,134.69
Miscellaneous		1,901.53
Total revenues		\$805,856.26
Operating charges		748,198.91
Net revenue		\$57,657.35

Contention of Respondent.

Upon the matters upon which this rehearing was granted the respondent contends that in arriving at a schedule of rates to yield what the law says is a fair return on the value of its plant, the Commission should consider the following things:

(1) "An allowance of \$42,649.84 to cover the deficit between net operating income under the new rates fixed by the Commission as applied to the company's actual experience in 1927 (\$117,350.16) and a return of 8 per cent on \$2,000,000 (\$160,000)."

(2) "An allowance of \$21,600 for income tax on net earnings of \$160,000 at 13½ per cent. In this connection we contend that the foregoing amount should be allowed in full, but if the Commission should take into consideration the greater allowances made by the Federal Government for depreciation and depletion that would not reduce the amount of tax to be paid by more than 50 per cent."

(3) "An allowance for an annual fall-off in industrial sales of 10 per cent of 868,109,000 cubic feet (industrial sales in 1927), or 86,811,000 cubic feet, at 35 cents, or \$30,383. (This fall-off has averaged 17.3 per cent yearly since 1923, and has already exceeded 10 per cent during the first quarter of 1928). In all fairness this allowance for industrial fall-off should be materially P.U.R.1928E.

increased in order to provide for the prospective fall-off in the years following 1928."

(4) "An allowance to amortize the annual additions to gas well construction account, beginning with January 1, 1927. The Commission had made no allowance for gas well construction account, either as an item of capital valuation or as an item of future expense. However, for the year 1927 more than \$40,000 was expended for this purpose, and past experience indicates that a like amount will be expended annually in the future. We submit these annual expenditures of \$40,000 should be amortized over a period of ten years. This will make an allowance of \$4,000 for the first year, \$8,000 for the second year, \$12,000 for the third year, \$16,000 for the fourth year, \$20,000 for the fifth year, etc., or a total of \$60,000 for the 5-year period for which the Commission is providing. This makes an average allowance of \$12,000 for each of the five years."

Depreciation and Amortization.

Considering these claims in the reverse order of their statement by counsel, it must be kept in mind that an annual charge of \$40,000 has already been estimated "to take care of the depreciation and provide for the retirement of the additions to capital that are necessarily made from year to year, including gas well construction costs." That estimate was made on the assumption that because of the amount of drilling already done in the respondent's gas territory, future investments in gas well construction would not be so large as those of prior years. In 1926, \$36,201.29 was invested in this account. However, the sum of \$40,731.20 was expended for gas well construction in 1927, and the respondent insists that its experience "indicates that a like amount will be expended annually in the future."

In view of these circumstances, we are of opinion to estimate the future annual charge for depreciation and amortization at the amount suggested by Commissioner Divine in his report in this case, \$50,000.

Industrial Sales.

A sad state of affairs prevails in the company's business be-
P.U.R.1928E.

cause of the steady decline of sales of gas for industrial and manufacturing purposes. This business is highly essential to the successful operation of the plant, constituting a constant demand for its facilities. Its loss must be reflected in higher charges to domestic consumers whose demands upon the company's facilities are limited to the colder period of the year and, for peak requirements, to certain hours of the day.

Industrial sales since 1921 have been as follows, in M cubic feet:

1922	1,642,755
1923	1,886,263
1924	1,707,842
1925	1,282,821
1926	1,062,268
1927	868,109

No manufacturer or other consumer of gas for industrial purposes has appeared or testified in this case to give us the benefit of his judgment on the future market for this service. No suggestion has been made that the present rate of 40 cents per thousand is not satisfactory to the industrial colony of Clarksburg. It appears from the testimony given by others, however, that the decline in sales of industrial gas may be accounted for by the fact that many plants are substituting other fuel; and it is doubtless true that some industries are suffering from a loss of market for their products. We are told in the argument that a reduction in price will not retard the decline in consumption.

Upon the record in this case, therefore, there is no escape from the conclusion that the respondent's sales of gas for industrial purposes will continue to fall off. Officers of the company estimate the decline at 10 per cent, or 86,810 M cubic feet, next year.

However, it is not to be expected that the sales of the respondent will continue as low as they were in 1927. Industrial consumption will no doubt decline, but sales to domestic and commercial consumers are already on the increase. This class of customers bought 47,000 M cubic feet more gas the first three months of 1928 than during the same months of 1927. Sales to these consumers the past five years have fluctuated, and there
P.U.R.1928E.

is no reason to expect future sales to be below the average as the city resumes its commercial activity. A statement of gas consumed by domestic and commercial consumers and in public buildings since 1922, in M cubic feet, is as follows:

1923	1,562,413
1924	1,659,034
1925	1,551,973
1926	1,635,598
1927	1,436,717
Average	1,569,147
Average exceeds 1927 by	132,430

With the evidence of the city manager and other qualified witnesses that general business conditions are improving, it is by no means unreasonable to expect the future sales of gas to domestic and similar consumers to reach the average for the past five years. At any rate, it may be safely assumed that the increase in domestic, commercial, and municipal consumption next year will equal the loss in industrial sales, and that the quantity of gas sold in the future will be as great as that sold in 1927—2,373,443 M cubic feet.

Federal Income Taxes.

[3] This Commission has long adhered to the principle that taxes actually paid by a public service corporation are a legitimate charge against operating costs, including Federal income taxes. *C. H. Meade Coal Co. v. Appalachian Power Co.* 10 Ann. Rep. W. Va. P. S. C. 199, 2 P. S. C. W. Va. Decisions, 88, P.U.R.1923E, 221.

The net revenue of the respondent in 1927 was \$57,657.35, against which were charged additional depletion allowances to enable it to escape Federal income taxes for that year. We have heretofore found that the lawful revenues of the respondent should be approximately \$100,000 more than those of 1927. It is highly improbable that \$21,600 will be assessed for income taxes on such an earning. The statistician's report states the income tax applicable to net earnings of \$117,951.29 in 1926 (subject to depletion allowances made by the treasury department), to have been \$2,272.68. This is the only guide afforded for P.U.R.1928E.

estimating this charge in the future, and, upon this basis, the charge is estimated at \$8,000.

General taxes paid in 1927 aggregated \$48,151.19, according to the respondent's books. This charge will, therefore, be estimated at \$56,151.19 for future years.

Probable Operating Charges.

With the record of the operations of the respondent for 1927 before us, the following appears to be a fair estimate of future operating charges:

General operating expenses	\$338,125.99
Gas purchased, 1,279,573 M cu. ft.	318,721.73
Taxes	56,151.19
Commission expense amortization	3,200.00
Depreciation and amortization	50,000.00
 Total operating charges	 \$766,198.91

Rates Required.

Calculated on the assumption that industrial sales will decline 86,810 M cubic feet and that domestic assumption will increase an equal amount over 1927, and assuming other sales at least equal to those of 1927, a rate of 38 cents per thousand is required for all gas in excess of the first 2,000 cubic feet per month as provided in the order of December 23, 1927, 2 P. S. C. W. Va. Decisions, 611, P.U.R.1928B, 290, except that it appears that the respondent can not market the gas from certain isolated wells, now being sold to Hope Natural Gas Company, at a greater price than 25 cents per thousand. Such rates should afford the respondent a fair compensation for the use of its property in the service of the public, and are, of course, subject to future adjustment should necessity require it.

P.U.R.1928E.

OKLAHOMA CORPORATION COMMISSION.**RE OKLAHOMA-ARKANSAS TELEPHONE COMPANY.**

[Cause No. 8417, Order No. 4447.]

Apportionment — Telephone tolls — Burden of proof.

1. A local telephone company complaining against the adequacy of a toll apportionment according to an arrangement between local and long distance companies which had been in effect throughout the state in excess of twelve years was held to have the burden of proving that such basis for compensation was unjust, unfair, or unreasonable in view of the character of service rendered, p. 745.

Apportionment — Compensation for toll calls — Collateral expenses.

2. Collateral expenses incidental to the handling of long distance calls such as toll checking and line testing service by local companies should be settled by independent agreement between the local and long distance companies, and should not be confused in the apportionment of compensation between the companies for the actual transmission of such calls through the respective exchanges, p. 745.

Apportionment — Toll lines owned by local company.

3. The proper method to determine the cost of handling toll calls as between a long distance and a local telephone company (also owning long distance lines) is to base the compensation on the cost of handling the whole toll business by the proper exchange, regardless of whose line it went over, rather than to separate the cost of handling tolls over the respective lines of the two companies, p. 748.

Apportionment — Station-to-station toll calls.

4. A so-called "two station" method of estimating the cost of handling toll calls on the basis of the use of telephone facilities from one local station to another was held to be more suitable than a "one station" method contemplating the service rendered through the use of one station to the toll board and from the toll board to the toll line, p. 748.

[October 1, 1928.]

APPLICATION of an independent telephone company for an order making an allowance and fixing the compensation for the use of facilities connected with the handling of toll business of a long distance company; tolls apportioned in accordance with opinion and order.

By the Commission: In 1915, this Commission issued Order No. 912 by which it adopted a standard arrangement for determining the exchange compensation due to services performed in connection with exchange and toll line connections. This arrangement is based upon an allowance to the origi-

V.U.R.192SE.

nating exchange of 3 cents per message and 15 per cent of the toll charge and an allowance to the terminating exchange of 4 cents per message. "Out collect" messages are treated as "in messages" and vice versa. By Order No. 912, all telephone companies connecting with the Bell Company were given the option to settle under existing contracts or to enter into a new arrangement upon the basis above stated. With few exceptions, all companies elected to enter into the standard arrangement.

The complainant, Oklahoma-Arkansas Telephone Company, owns exchanges in Le Flore county, Oklahoma, located at Poteau, Heavener, Howe, and Wister, and owns toll lines connecting these exchanges, and also owns a portion of the toll lines connecting Poteau with Monroe, Oklahoma. It also owns toll lines extending from Poteau to the city of Fort Smith, Arkansas. The respondent, Southwestern Bell Telephone Company, owns the exchange at Fort Smith, Arkansas, and many other exchanges in Oklahoma, Arkansas, Texas, Missouri, and Kansas, and has a general system of toll lines connecting its exchanges and through connections with other lines affording a general telephone service over the United States and extending to foreign countries. It also has toll lines extending from Fort Smith, Arkansas, to Poteau, Oklahoma, and there connected with the Poteau switchboard of complainant.

In 1923, the complainant and respondent entered into a written contract for connection of their respective lines superseding all prior arrangements and definitely adopting the standard 3 cents, 4 cents and 15 per cent present arrangement, above referred to, as the basis of determining exchange compensation. This contract provided for connection of the toll lines of the respondent, (hereafter for convenience referred to as the Bell Company), with the switchboard of the complainant, (hereinafter referred to as the Poteau Company), at Poteau, Oklahoma, and for connections of two toll circuits of the Poteau Company with the switchboard of the Bell Company at Fort Smith, Arkansas, and provided that the Poteau Company might handle over its own toll lines to Fort Smith messages originating at its exchanges in Oklahoma destined for termination at Fort Smith or for termination at other stations in Arkansas
P.U.R.1928E.

east of Fort Smith whose proper routeing was to Fort Smith or through Fort Smith. All "in calls" for Oklahoma-Arkansas points originating on the lines of the Bell Company or of its other connecting companies were to be transmitted through connection between the lines of the two companies at Poteau, Oklahoma. Line haul on joint messages was to be apportioned between the companies pro rata according to air-line distance from points of origin and distance to points of transfer, and toll rates quoted were to be according to air-line distance between points of origin and transfer.

It appears that for convenience and to eliminate cost and delay incident to keeping tickets on "in calls", the customary method of settlement under such contract, was to arrive at a composite percentage after a traffic study of some three months, and thereafter apply this percentage to determine the settlements until change in traffic would suggest new studies and new composites. From the execution of the contract referred to in November, 1923, until January 1, 1927, the companies had settled monthly, as required by Order No. 912 of the Commission, upon a composite representing the estimated compensation under the contract rates. In the latter part of 1926, the Bell Company made another traffic study to determine a new composite for settlement. This new composite appeared to result in slightly increased compensation to the Bell Company over that produced by the former composite upon which the companies had been settling. However, the Poteau Company ceased settling under the contract in January, 1927, and contended to the Bell Company that the contract compensation was inadequate, and without the consent of the Bell Company the Poteau Company began holding out 25 per cent of the toll revenue upon both "in" and "out calls". This resulted in the Poteau Company retaining each month between \$300 and \$400 more revenue belonging to the Bell Company than it was entitled to retain under the terms of the contract. After efforts for settlement between the companies, under the contract, had availed nothing, an informal conference was had with the Commission in October, 1927, to see if matters could be adjusted. Representatives and attorneys representing both

P.U.R.1928E.

companies appeared before the Commission, and the matter was discussed at some length. Nothing came of the conference, and in December, 1927, the Bell Company filed with the Commission its application for approval of the cancellation of its contract with the Poteau Company. This application stated that the Bell Company had given notice to the Poteau Company of the termination of its contract, as provided by the contract, the termination to take effect January 14, 1928, and alleged that the Poteau Company was withholding something like \$4,000 of the money due the Bell Company under the contract, and had refused to settle under the contract. The application asked the Commission to approve the notice of the termination of the contract given by the Bell Company. The case was regularly set for hearing and all parties notified, and on January 3, 1928, hearing was had, both companies appearing by their representatives and by their attorneys. At that hearing it was substantially agreed by both parties that the contract might terminate. The Bell Company asked for termination because of the breach of contract by the Poteau Company, and the Poteau Company took the position that the compensation afforded by the contract was inadequate, and the Commission approved the notice of cancellation and consented to the cancellation of the contract, and issued its order to that effect on January 8, 1928. (Order No. 4057). After the hearing of January 3, and on that date, the Poteau Company filed its original complaint in this case asking this Commission to determine the allowance and compensation to be paid the Poteau Company due to the connection of the lines of the two companies.

On the 1st day of February, 1928, said Poteau Company filed a supplemental complaint, setting forth that the Bell Company had constructed a toll line into a building adjoining the building occupied by complainant, and had installed a long distance toll board and exchange in said building and connected therewith its toll line facilities; that the Bell Company thereupon refused to accept and transmit long distance messages originating over complainant's lines within the city of Poteau, as well as messages originating in other parts of the state
P.U.R.1928E.

and for delivery to stations or persons within the city of Poteau, in conformity with the usual and ordinary practice of handling such messages; that the Bell Company had notified complainant that it would handle its own toll business to and from the city of Poteau, Oklahoma, and would no longer permit complainant to handle toll business passing over its lines into and out of Poteau; that the operation of said exchange and the toll board is contrary to the interest of the public, constituting a duplication of facilities and service, and results in a burden on complainant and on the public served by it; that said action by the Bell Company is contrary to the general practice and contrary to the economical operation of toll lines and exchanges in the handling of long distance messages. Complainant then alleges that it has a toll line from Poteau, Oklahoma, to Fort Smith, Arkansas, and has heretofore transmitted messages originating in Poteau, over its own lines to Fort Smith, Arkansas, and there deliver the same to the Bell Company for transmission and delivery to the various stations of that company in the city of Fort Smith, but that the Bell Company, since January 22, 1928, has refused to accept such messages, thus requiring such long distance messages to be transmitted by way of the temporary toll board and exchange of the Bell Company, installed by it at Poteau on January 22, 1928, and over the lines of the Bell Company to Fort Smith, Arkansas, and points beyond; that the Bell Company accepts such messages at its toll board, transmits same, collects and receives the entire toll charge therefor, and refuses to permit complainant to participate in any manner in the toll charge received for the handling of said messages, and has refused to compensate complainant for the use of its property and the services rendered by it in transmitting said messages through its subscribers stations and through its switchboard to the toll exchange of the Bell Company. Complainant concludes its supplemental petition by praying that the Bell Company be required to restore the service as it existed prior to January 22, 1928, as affecting the service to the towns of Poteau, Wister, Heavener, and Howe, Oklahoma, and that it be required to receive and transmit messages originating at the P.U.R.1928E.

Poteau exchange or subscribers stations in Poteau, under the charge and collect system in effect prior to January 22, 1928, and that the Bell Company be required to maintain a joint traffic arrangement with the Poteau Company on both "in" and "out" bound messages, and be required to receive and handle the same according to the practice prior to January 22, 1928, the division of tolls to be made according to the order of the Commission. It further prays that the Bell Company be restrained from operating and maintaining the toll board and exchange installed in Poteau, and that the Commission fix a reasonable division of tolls between the Bell Company and the Poteau Company pending the final hearing in this cause, subject to such adjustment as the Commission may determine in the final order herein, after a full hearing.

The matter was set for hearing upon the application for temporary relief as outlined by the supplemental petition on the 9th day of February, 1928, and was thereafter continued until February 21, 1928, at which time all parties appeared and announced ready, and the respondent, Bell Company, filing its response to said complaint, whereupon the Commission proceeded to hear the evidence offered, the hearing being concluded on the 23rd day of February, 1928.

The Bell Company at that hearing offered no testimony with respect to the matters and things involved in the supplemental complaint, but closed its case upon the testimony offered by complainant. During the trial, however, attorneys for complainant dictated into the record an offer to restore and resume telephone toll service with respondent, and offered to pay to said respondent any sums which it might owe it, based upon what is commonly called the 3, 4, and 15 basis, the settlement to be made up to the date of the filing of the original petition herein, and that from said date complainant would settle with respondent on the 3, 4, and 15 basis, subject to adjustment by final order of the Commission as to a proper final basis of settlement, all of which was conditioned upon the restoration by the Bell Company of the connections with complainant's toll line at the Fort Smith exchange, and upon the removal of its toll board or toll exchange at Poteau.

P.U.R.1928E.

On the 12th day of March, 1928, the Commission received a letter from counsel for respondent, submitting in effect the same proposition as offered by attorneys for complainant at the hearing, and offering to discontinue its toll office at Poteau and permit complainant to resume its agency at Poteau, but which did not offer to restore physical connection with complainant's toll line at Fort Smith, Arkansas.

Thereafter, on the 19th day of March, 1928, the Commission made and entered its Order No. 4142 (P.U.R.1928C, 830) in said cause, in which it was ordered that the Bell Company restore service between its toll line and the exchange of the Poteau Company as the same existed prior to January 22, 1928, in the town of Poteau, and as affecting the towns of Heavener, Howe, and Wister, within five days after payment by the Poteau Company to the Bell Company of all amounts due the latter company on account of interchange of service prior to January 22, 1928, calculated upon the general rate and charge of 3, 4, and 15, or upon any composite basis thereof which might be agreed upon by both parties, the residue of any such amount for messages handled to be prorated on the line haul basis between the concerns owning the lines. It was the further order of the Commission that after the restoration of the connection as ordered, that the Poteau Company be required to handle the exchange service with the Bell Company under the general rate schedule of 3, 4, and 15 and line haul basis, settling for all collections not later than the 20th day of the month following that in which service is rendered, as required by Order No. 912, until further order of the Commission, and the Bell Company retain the moneys it has collected through the operation of its long distance toll board from the time installed until same is discontinued under the terms of the order, for the town of Poteau, and settle with the Poteau Company on long distance tolls to the towns of Heavener, Howe, and Wister on the 3, 4, and 15 and line haul basis; that the Poteau Company retain 5 per cent as commission on all moneys collected in toll coin boxes in the town of Poteau during said time, and pay the balance to the Bell Company. It was also ordered that the Bell Company pay P.U.R.1928E.

the Poteau Company for each trunk maintained and operated into the local exchange at Poteau, from and after January 22, 1928, and until service is fully restored as required by the order, a rate of $1\frac{1}{2}$ times the business rate charged for service in the city of Poteau. It was also ordered that the Poteau Company furnish a surety bond in the sum of \$2,500 to the Bell Company, subject to the approval of the Commission, conditioned upon the payment of all moneys due the Bell Company under the terms and provisions of the order, on or before the 20th day of each month respectively, as such sums may become due, until the further order of the Commission. That part of the application of complainant for an order requiring the restoration of the facilities of the two companies at Fort Smith, Arkansas, was denied on the grounds that the Commission had no jurisdiction over such connections and exchange facilities within the state of Arkansas.

Notice of appeal from said order and findings of the Commission was given by the Poteau Company on the 29th day of March, 1928, to the supreme court of the state of Oklahoma. Final hearing upon the establishment of rates and charges for the services rendered by the Poteau Company, through its exchange at Poteau, was set for hearing on May 1, 1928, but was continued until May 8, 1928, at which time all parties appeared and announced ready, and the taking of testimony was commenced. Pending the final hearing, the Poteau Company refused to take advantage of the terms and conditions of Order No. 4142, *supra*, and so for that reason the conditions with respect to connections and service arrangements at Poteau and Fort Smith have remained as they existed at the time of the promulgation of Order No. 4142, *supra*. The hearing upon final application for rate adjustment continued throughout May 8, 9, 10, and 11th, and was then continued until May 22nd, at which time hearing was conducted on May 22, 23, and 24th, and the case was closed. Oral argument was requested and conducted before the Commission on July 5, 1928.

In the taking of testimony at the final hearing much more territory was probably covered, both on direct and cross ex-P.U.R.1928E.

aminations, than was necessary for the termination of the issues which confronted the Commission. Voluminous exhibits upon the part of the complainant were introduced, part of which were designed to show the practice existing in other states with respect to the compensation which a local exchange should receive at the hands of connecting companies for the service rendered in the handling of toll calls. These exhibits clearly show that in practically all of the states the compensation paid the local exchange by the connecting company is less than that paid the Poteau Company by the Bell Company, and was less than that which has been in effect in the state of Oklahoma and acquiesced in by all concerned for a number of years. The Bell Company also introduced exhibits tending to show that the compensation paid the local exchanges in Oklahoma, under the so-called 3, 4, and 15 per cent basis, was the highest compensation paid local exchanges by the Bell Companies in other states in the Union.

The issue before the Commission, however, is as to whether or not, under the facts, conditions, and circumstances, the Poteau Company is receiving compensation for the service rendered to the Bell Company in handling toll calls through its exchange at Poteau, which is reasonable and commensurate with the service rendered.

[1, 2] Mr. H. P. Topping, a telephone engineer, testified at length with respect to the result of the relationship which has heretofore existed between the two companies in the conduct of their business in the city of Poteau, in connection with the service rendered in handling toll calls from Poteau, Howe, Heavener, and Wister to outside points, as well as with respect to handling the "in" calls from the Bell Company's lines to the exchanges of the Poteau Company, and to their patrons. The basis for compensation for such service, for a number of years in the state of Oklahoma, has been what is ordinarily termed the 3, 4, and 15 basis, which means that on "out" calls the exchange is entitled to 3 cents plus 15 per cent of the amount due for the call, and upon "in" calls is entitled to obtain 4 cents per message for the service rendered in transmitting the toll message through the exchange to the P.U.R.1928E.

subscriber, or the person called. This compensation has been in effect throughout the state of Oklahoma for some twelve or thirteen years, with one or two special instances in which, under contract, other charges have been made for the rendition of similar service. It is, therefore, apparent that the complainant company in this instance, as in other similar instances, must bear the burden of proof of showing that the basis upon which compensation is now being allowed, and has in the past been allowed, is not fair, reasonable, or just and does not constitute a reasonable compensation for the character of service rendered in the conduct of the telephone business. Confused with this charge for the services rendered in transmitting telephone calls through exchanges, are other charges which have been referred to in the record, such as the service rendered by the connecting company in connection with the checking of calls which may be handled by local exchanges and center checking for tributary exchanges, as well as the service rendered by the connecting company and referred to as a testing service. In this case, the complainant has asked that the Commission give consideration to these elements in connection with the remuneration which should be received by the Poteau Company in arriving at the proper basis for compensation between the two companies. In the larger exchanges there is considerable work to be done of the character described as check center service; that is where Poteau accepts a call from Heaven-er, makes a ticket and handles the call through to its destination, it is considered a switching service, and the remuneration therefor is not contemplated in the allowance of 3, 4, and 15 referred to above. An instance of this character may be referred to at Frederick, Oklahoma, where the connecting company which does not own an interest in the toll lines receives 3, 4, and 15 on Frederick business, and in addition to this receives a flat rate of \$100 per month paid for switching the calls through Frederick from nearby towns such as Davidson, Manitou, etc. The connecting company also performs what is known as a testing service conducted by its plant employees, whereby the toll company is enabled to more easily care for its toll line troubles. Complainant in this case shows in P.U.R.1928E.

its exhibit, an expense charge for the plant man for the cost of testing. However, it nowhere appears, as far as we are able to ascertain in the exhibit, any payment by the Poteau Company for this service which amounts to \$180 per year. It would appear from the record in this cause, that the amount of switching and the amount of testing should be a matter of agreement between the two companies and should not be considered as any part of the compensation to be fixed in the contract under which the connecting service is ordinarily rendered. It, therefore, would appear that the cost of these features should be eliminated.

It is ordinarily considered that the check centering expense and the switching expense referred to above, should about balance each other; that is, if the Poteau Company at Poteau performs a switching service for a Heavener call, the Bell Company at McAlester or Fort Smith would also perform the same service, and if the call is of a sufficient number of miles, it will be handled by two or three center checking offices, and the cost of this switching should properly be charged against the toll line, and not to the compensation of the exchange, as the distance of the message will determine its rate as will the distance of the message determine the number of switching centers that have to handle it at each additional expense involved. Upon the other hand, the Bell Company calls attention to the fact of the long-haul messages where it not only furnishes additional switching facilities to offset the switching facilities of Poteau, but also furnishes expensive amplifying repeater stations to offset any charge the Poteau Company might have on account of switching. The Poteau Company also performs a dual service within its own organization, in that the Heavener office makes a complete ticket record of every call, and the Poteau office makes a complete ticket record of every call, and those are balanced against each other, which is a practice, as it appears to the Commission, to be a good one from an accounting standpoint, and the added expense thereof should not be considered in the determination of whether the 3, 4, and 15 basis pays an adequate return for the service rendered.

P.U.R.1928E.

[3] There is also presented in this case the cost of handling the Bell Company's business and the cost of handling the Poteau Company's business, which has been separated, while the proper method would be to determine the cost of handling the toll business by the exchange, regardless of whose line it went over, and then compensate the exchange for the transacting of such business.

[4] In order to determine the amount of exchange investment, as well as the cost of the rendition of the exchange service, Mr. Toppin adopted two methods in his peg count; one where he counted a representative number of calls to determine the cost of the labor, etc., and the other to determine the amount of holding time for the purpose of arriving at the amount of exchange investment involved which was used by toll service. Each of these methods would seem proper to arrive at the amount of compensation which toll should pay for exchange service, for the reason that one will show the amount based upon the cost of the service, while the other shows the amount based upon the investment involved. However, the count upon one day would perhaps show the holding time more on Bell Company calls, and the next day more on the owned line calls; therefore, the general average of all calls would appear to be the more fair method of arriving at a conclusion. Likewise, in the exhibit of Mr. Topping, he sets forth as a basis for his calculations with respect to the compensation which the exchange should receive at the hands of toll, both the one station and the two-station methods. The one station contemplates the service rendered through the use of one station to the toll board, and the toll board to toll line. The two station contemplates the use of the facilities of a local station to another local station. It is, therefore, apparent that the two-station method would involve the use of twice as much exchange facilities on a local call as would be used from a local station on toll. However, Mr. Topping discarded on the last portion of his exhibit, any reference to the one-station method, and has used the two-station plan, which appears to the Commission to be the most suitable method to apply in this case.

The question before the Commission for determination, as
P.U.R.1928E.

the Commission now views it, is as to whether or not the generally accepted basis of compensation throughout the state, and the one which has heretofore been applied between the Poteau Company and the Bell Company in their relations, results in a sufficient compensation for the use of the properties involved in the rendition of the service.

The Poteau Company in its annual report to the Commission for 1927, shows a revenue of \$41,525.60, and a book value of \$121,126.17, and with the expenses including \$9,073.08 for depreciation and \$8,640 as interest on outstanding bonds, it reflects a deficit of \$1,360.86. However, adjusting these figures to 5 per cent for depreciation on the plant, less real estate value, and deducting the interest on bonds, which is not allowable as an operating charge in a rate case, leaves a profit to the concern, by its own annual report, of \$10,483.02, or 8.6 per cent on the investment. The figures in the exhibits introduced follow substantially these same amounts, showing the same earnings for the year. This includes the exchange rent, toll receipts from owned lines and commission from owned lines, as well as the Bell Company's lines, which, if increased as contended for, would show a correspondingly larger revenue. The Topping exhibit shows that the Bell Company's commissions paid to the complainant company to have been \$4,127.93, but which was explained at the hearing to be excessive to the amount of \$544.28 for the reason that there had been included toll messenger fees and postage, and \$398.52 paid to the Bell Company at Fort Smith for terminating Poteau owned line business. The \$398.52 paid to the Bell Company at Fort Smith appears to have really been a deduction from line haul, and should be added back to the toll commission, and which results in the sum of \$3,982.17 earned by the Poteau Company from the Bell Company commissions.

The exhibit also shows that the company's owned toll lines properly allocated to the exchange on the 3, 4, and 15 basis, would accrue to the exchange the sum of \$2,342.98, making total commissions received by the company amounting to \$6,325.15. This same exhibit shows the cost of handling all toll business, based upon the amount of time and service rendered by the em.
P.U.R.1928E.

ployees on the proration basis, to have been \$3,725.48. However, this includes \$629.83 which is the plant expense charged to toll, and which should be charged against the line and not against the agent's compensation. By deducting this charge and accepting the prorations according to the exhibit introduced, and which results in an expense for 1927 of \$3,095.65, there is reflected a profit to the company of \$3,229.50 for handling the toll business during this period. Mr. Topping's exhibit, applying 5 per cent for depreciation on the book value, shows that to adequately compensate the exchange for service rendered by it in connection with toll business, including a profit of 10 per cent which he admits is an arbitrary figure, that complainant's owned lines should compensate the exchange to the extent of \$2,098.87, and that the Bell Company's toll lines should compensate the exchange in the amount of \$5,163.56; or that in order for the exchange to be properly and reasonably compensated, it should earn for the service rendered by it in connection with toll calls, the sum of \$7,262.43, whereas, by his own figures, and applying the same method, the toll lines of the two companies did compensate the exchange for rendering the service, in the sum of \$6,325.15, or in a sum only \$937.28 less than claimed by his exhibit and by his testimony in support thereof.

In the cost of operation, to-wit, \$3,095.65, there is included the cost of switching service at Poteau in instances where Poteau handles toll calls from its tributary office from the Bell Company's lines, which amount cannot be accurately separated from the available information at hand, but which is a cost that should be borne by the toll lines and which would appear to balance the deficit of \$937.28 and the figures used would, therefore, appear to result in just about what the exhibit of Mr. Topping and his testimony contends should result as compensation for the service rendered by the exchange of the Poteau Company for the service rendered by it.

From these considerations it would appear that complainant has failed to meet that requirement of assuming the burden of proof and establishing the fact that the arrangement heretofore existing between these two telephone companies, in so far as compensation is concerned, which is the general ar-

P.U.R.1928E.

rangement throughout the state, fails to compensate complainant's exchanges for the service rendered by it in handling toll calls through its facilities. In the absence of clear and convincing proof that a present rate is insufficient to result in a reasonable earning on facilities used in the rendition of the public service, the Commission has always declined to increase the charges therefor.

Testimony was introduced on behalf of the respondent showing that there was due the Bell Company from the Poteau Company the sum of \$4,638.23, which sum includes checks to the amount of \$469.85 held by the Bell Company but uncashed, for toll messages handled by the Poteau Company for the Bell Company to January 22, 1928, said sum having been arrived at by using the composite agreed to by the respective companies in 1923, and used by them as a basis of settlement up to January 22, 1928; and that there was the further sum of \$909.63, which includes an uncashed check of \$95.10 due the Bell Company from the Poteau Company for toll messages handled by the Poteau Company for the Bell Company from January 22, 1928, until April 20, 1928, computing the same under the terms of the Commission's temporary order No. 4142, under date of March 19, 1928, P.U.R.1928C, 830. The complainant offered no testimony to refute these amounts and apparently acquiesced in the correctness of these amounts, assuming that the basis used was correct.

After giving all the facts, circumstances, and conditions presented to the Commission by the complaint filed and in the testimony adduced at the trial, that consideration to which we believe it is entitled, the Commission is of the opinion and finds:

First: That from the exhibits introduced by complainant with respect to the amount of earnings to which it is entitled for the rendition of service by its exchanges in connection with the handling of toll calls, the Poteau Company has failed to show the necessity for increased compensation or earnings for the service rendered.

Second: That the general basis in effect in the state of Oklahoma of 3 cents on "out" calls plus 15 per cent of the P.U.R.1928E.

amount thereof, and 4 cents on "in" calls and applied to the business handled by the Poteau Company in its relationship to the Bell Company, results in reasonable compensation for the service rendered.

Third: That the relief prayed for, relating to increased compensation to the Poteau Company for the service rendered in its exchange in connection with the handling of toll calls, both into its exchange from outside points, and out of the exchange to outside points, should be denied.

Fourth: That at the time of the hearing of this cause the Oklahoma-Arkansas Telephone Company was indebted to the Southwestern Bell Telephone Company on account of their interchange relationship in the handling of toll calls to January 22, 1928, in the sum of \$4,787.30; that the Oklahoma-Arkansas Telephone Company has made payments by checks to the Southwestern Bell Telephone Company in the sum of \$469.85, which amount the Southwestern Bell Telephone Company has not credited to the account of the Oklahoma-Arkansas Telephone Company and which checks the Southwestern Bell Telephone Company has not attempted to collect; that the Southwestern Bell Telephone Company should make collection on these checks and after collection has been made the amount of the indebtedness of the Oklahoma-Arkansas Telephone Company to the Southwestern Bell Telephone Company to January 22, 1928, will be \$4,317.45; that the Oklahoma-Arkansas Telephone Company is indebted to the Southwestern Bell Telephone Company from January 22, 1928, to April 20, 1928, in the sum of \$909.63 and on which indebtedness the Oklahoma-Arkansas Telephone Company has tendered the Southwestern Bell Telephone Company its check in the sum of \$95.10, which the Southwestern Bell Telephone Company has not attempted to collect and has not credited the amount of the Oklahoma-Arkansas Telephone Company with the amount of the check; that the Southwestern Bell Telephone Company should make collection on this check, crediting the Oklahoma-Arkansas Telephone Company with the amount of it; that when collection has been made the net amount of indebtedness from the Oklahoma-Arkansas Telephone Company to the Southwest-P.U.R.1928E.

ern Bell Telephone Company for the period January 22, 1928, to April 20, 1928, will be \$814.53; that the net amounts of \$4,317.45 to January 22, 1928, and \$814.53 from January 22, 1928, to April 20, 1928, will be the amount of indebtedness from the Oklahoma-Arkansas Telephone Company to the Southwestern Bell Telephone Company, which is \$5,131.98; that there is a difference in the percentages which should be credited by the Southwestern Bell Telephone Company to the account of the Oklahoma-Arkansas Telephone Company in the sum of \$149.07, which sum deducted from the amount of \$5,131.98 is \$4,982.91 and which is the correct amount that the Oklahoma-Arkansas Telephone Company should pay to the Southwestern Bell Telephone Company to April 20, 1928; that said sum should be paid promptly to the Southwestern Bell Telephone Company before the restoration of the service petitioned for by the Oklahoma-Arkansas Telephone Company; that in addition thereto, such sums as may have accrued since the hearing of this cause on account of toll business passing through the exchange at Poteau from the exchanges at Heavener, Howe, and Wister, shall be settled for upon the basis of 3, 4, and 15 as outlined herein, and in case of disagreement in the method of calculation as to the amount due, same should be submitted to the Commission's auditors and to the Commission for arbitration and settlement; the residue of such charge for messages handled, after making allowance for the amounts due under the 3, 4, and 15 basis of settlement, shall be prorated between the companies owning the lines upon the line haul basis.

Fifth: That the Poteau Company and the Bell Company should be required to reconnect their toll lines and switchboards as the same existed prior to January 22, 1928, and should be required to continue to handle the toll business into and out of the towns served by said companies in the same manner and upon the same basis as the same was handled prior to January 22, 1928, and that from and after the date of this order the said companies should settle with each other upon the so-called 3 cent, 4 cent, and 15 per cent basis, or P.U.R.1928E.

some composite thereof which might be agreed to by the two companies.

Sixth: That the Bell Company be required to pay to the Poteau Company for trunk line connections in the city of Poteau from and after January 22, 1928, up to the restoration of connections between the exchange of the Poteau Company and the toll lines of the Bell Company at the rate of $1\frac{1}{2}$ times the business rate charged for service in the city of Poteau, and that the Bell Company should also pay to the Poteau Company a commission of 5 per cent for all moneys collected for toll messages originating in the long-distance telephone booths located in the city of Poteau, where said collections were made by the Poteau Company, and that the Poteau Company should pay to the Bell Company the remaining 95 per cent of said collections for all calls handled exclusively over the Bell Company lines.

Seventh: That that portion of complainant's petition asking for an order re-establishing connection of its toll line facilities in the city of Fort Smith, with the exchange facilities of the Bell Company in the city of Fort Smith, should be denied for the reason that the same is beyond the jurisdiction of this Commission.

It is therefore the *order* of the Commission, premises considered, that the petition of the Oklahoma-Arkansas Telephone Company, for an allowance of increased compensation for the service rendered by its exchange at Poteau, Oklahoma, terminating, originating, and collecting for toll messages over the lines of the Southwestern Bell Telephone Company, be and the same is hereby denied.

It is the *further order* of the Commission that the complainant, the Oklahoma-Arkansas Telephone Company, pay to the respondent, the Southwestern Bell Telephone Company, within twenty days from the date of this order in addition to the checks tendered in partial payment to the total amount of \$564.95, the additional sum of \$4,982.91 to cover the amount due the said Southwestern Bell Telephone Company to the 20th day of April, 1928, and that said complainant shall also within twenty days from the date of this order furnish a good and sufficient bond in the sum of P.U.R.1928E.

\$2,500, payable to the respondent, same to be approved by this Commission, conditioned that the complainant shall well and truly comply with the terms of this order and shall make the settlement with the respondent according to the terms of this order on or before the 20th day of each calendar month hereafter for the business handled for the preceding month.

It is the *further order* of the Commission, that the Southwestern Bell Telephone Company be and it is hereby ordered and required within five days from and after the payment of the amount of the indebtedness found to exist to April 20, 1928, and due it from the Oklahoma-Arkansas Telephone Company, to restore the physical connection of its toll lines with the exchange of the Oklahoma-Arkansas Telephone Company and to restore the service heretofore rendered by and between said companies as it existed prior to January 22, 1928, and that the Oklahoma-Arkansas Telephone Company be and it is hereby required to co-operate in said re-establishment and said reconnection of said service and to handle the toll business of the two companies upon the basis of compensation heretofore in effect, and which is the generally established rate of compensation for such service throughout the state of Oklahoma, to-wit, 3 cents on "out" calls plus 15 per cent of the amount of such calls, and 4 cents on "in" calls or upon any composite basis thereof which may be agreed upon by both parties, the residue of any such charge for messages handled to be prorated on the line haul basis between the concerns owning the lines.

It is the *further order* of the Commission, that the complainant and respondent herein shall within sixty days from date of this order determine the amount due the respondent herein from the complainant for business handled into and out of the towns of Heavener, Howe, and Wister and from the complainant's agents computed upon the 3 cents, 4 cents and 15 per cent and line haul basis and that the Southwestern Bell Telephone Company shall retain the monies it has collected through the operation of its long distance toll board from April 20, 1928, and until same is discontinued hereunder for the town of Poteau; that the Oklahoma-Arkansas Telephone Company retain 5 per cent as its commission of monies which it has collected in toll P.U.R.1928E.

coin boxes in the town of Poteau during said time and pay the balance to the Southwestern Bell Telephone Company, and that the Southwestern Bell Telephone Company shall pay the Oklahoma-Arkansas Telephone Company for each trunk maintained and operated into the local exchange at Poteau from and after January 22, 1928, and until service is fully restored at a rate of $1\frac{1}{2}$ times the business rate charged for service in the city of Poteau as provided in the Commission's temporary order No. 4,142, *supra*; and in the event of the failure of the parties hereto to agree upon the amount due the respondent during said period of time, then and in that event the auditor for the Corporation Commission shall compute said amount and shall notify the complainant and respondent herein of the amount found due the respondent by said auditor, and the said complainant shall pay said amount within twenty days from the date of receipt of notice of amount found due by the auditor of the Corporation Commission.

It is the *further order* of the Commission, premises considered, that complainant's application for restoration of its toll line connection in the city of Fort Smith, Arkansas, with the Southwestern Bell Telephone Company's exchange at that point, be and the same is hereby denied for want of jurisdiction.

It is the *further order* of the Commission, that in case it shall be found that there has been an error or errors in the computation of the amount found due the respondent herein, either party may file an application with the Commission setting forth such alleged error and upon showing to the Commission, after hearing, of any such alleged error, the Commission will order the same corrected and will order payment made to either party to whom payment may be found due, provided, however, the filing of any application alleging a discrepancy in the amount found due by the Commission herein shall not operate to extend the time of the payment ordered herein and such sum found due herein shall be paid in the time specified in this order the same as if an application for correction had not been filed.

P.U.R.1928E.

SOUTH DAKOTA SUPREME COURT.

**SOUTHWEST BRANCH OF RURAL RECIPROCAL
TELEPHONE COMPANY**

v.

DAKOTA CENTRAL TELEPHONE COMPANY et al.

[Nos. 6059, 6060.]

(— S. D. —, 220 N. W. 475.)

Commissions — Jurisdiction over physical connection — Expense apportionment.

1. A Board having discretion delegated by statute to order physical connection between two telephone companies and to apportion the expense thereof, "if in its judgment public service demands such connection and the lines of the applicant are in proper condition," may direct an urban telephone company to bear the entire cost of meeting the lines of a rural company proven to be properly constructed up to the corporate limits of the community where the former operates, p. 760.

Apportionment — Expense studies — Telephone switching service.

2. Estimates of the cost of operating telephone switching service based on studies confined to periods of greatest expense under conditions not entirely chargeable to such operations were held not to be of sufficient weight to show that an order of the Board fixing a less amount for compensation than such cost appraisal was unreasonable, p. 761.

Appeal and review — Presumption favoring Commission findings.

3. An order of the Board fixing the amount of compensation to be paid for switching service between telephone companies will be held justified unless there is evidence to show that the expense of rendering such service will be increased by an amount in excess of the provided compensation, p. 761.

Discrimination — When applicable — Telephone companies.

4. A statutory prohibition against discrimination by telephone companies between "persons or companies in the switching, transfer or delivery of messages" was held to apply only to the charges made by a company for services to its own subscribers, and to have no force in case of one company switching subscribers of other companies, p. 763.

(CAMPBELL, J., dissents.)

[July 7, 1928.]

CERTIORARI to review order of Board of Railroad Commissioners requiring the applicant telephone company to connect physically with lines of another company; order of Board affirmed.

P.U.R.1928E.

Appearances: Null & Royhl, of Huron, for petitioner Dakota Central Telephone Company; Boyee, Warren & Fairbank, of Sioux Falls, for petitioner Dell Rapids Telephone Company; Buell F. Jones, Attorney General, and Raymond L. Dillman, Assistant Attorney General, for Board of Railroad Commissioners.

Moriarty, Commissioner: This matter comes before the court by the consolidation of two proceedings originating in writs of certiorari granted by this court, and directed to the Board of Railroad Commissioners of this state.

The material facts are as follows:

At all times involved herein the Dakota Central Telephone Company has maintained and operated a telephone exchange in the city of Flandreau, the county seat of Moody county, and the Dell Rapids Telephone Company has maintained and operated an exchange in the town of Trent, which is situated about twelve miles southwesterly from Flandreau. Each of these companies also maintained and operated certain rural telephone lines connected with its own exchange. Subscribers on the rural lines of the Dakota Central Company were connected with Flandreau, but could not communicate with Trent or Dell Rapids without paying a toll charge.

Subscribers on the rural lines of the Dell Rapids Company were connected with Trent and Dell Rapids, but could not communicate with Flandreau without paying toll.

Certain farmers in territory tributary to Trent and Flandreau, and who desired telephone connection with both these places, formed an association by contributing to a fund which was used to erect a telephone system, one line of which was brought to the corporate limits of the city of Flandreau and another terminal of which was brought to the corporate limits of Trent.

This association operated under the name of Southwest branch of Rural Reciprocal Telephone Company. After bringing its lines to the corporate limits of Flandreau and Trent, as above stated, this association applied to the Board of Railroad Commissioners for an order directing and requiring the Dakota Cen-P.U.R.1928E.

tral to connect the association's lines with the Dakota Central exchange at Flandreau, and directing and requiring the Dell Rapids Company to connect the association lines with the exchange at Trent, and requiring each of said exchanges to perform the necessary switching services for the said association lines.

At the time this application was made, the Southwest Branch of Rural Reciprocal Telephone Company was not incorporated, but its application included a statement that the intention was that, as soon as the desired connections were secured, the members of the association would turn their lines over to the duly incorporated Rural Reciprocal Telephone Company, and take stock in that corporation.

The Board ordered a hearing on the aforesaid application. At the original hearing, and at an adjournment thereof, both the Dakota Central Company and the Dell Rapids Company were represented by counsel, and evidence was submitted for the applicant association and on behalf of the resisting telephone companies.

As a result of these hearings, the Board recorded its formal report, including its findings of fact, and entered its order granting the application. The resisting telephone companies petitioned for a rehearing, which was denied by the Board. Thereupon the resisting telephone corporations, who will hereafter be referred to as the petitioners, sued out the writs now before this court.

The record sent up by the Board shows that the Board found that the lines of the applicant association are in proper condition to be connected; that such lines have been constructed to the corporate limits of Flandreau and Trent; that public convenience and necessity require, and public service demands, that physical connection for switching purposes be made with the exchanges at Flandreau and Trent as applied for; that each of the petitioners should be required to bear all necessary cost and expense of connecting the applicant's lines with its exchange, and that such connection should be made within a reasonable time. The order entered by the Board was in accordance with these findings, and it fixed the sum of 18 $\frac{3}{4}$ cents per month for each station
P.U.R.1928E.

on the applicant's line as the compensation to be paid to each of the petitioners for switching services.

As to the extent of the review upon writs of certiorari: Section 3002 of the Revised Code of 1919 provides:

"The review upon this writ cannot be extended further than to determine whether the inferior court, tribunal, board or officer, has regularly pursued the authority of such court, tribunal, board or officer."

The briefs of the petitioners present three distinct contentions which we consider within the scope of review prescribed by statute, and as requiring discussion in this opinion. These contentions are as follows:

First. That the Board exceeded its authority and abused its discretion in requiring the petitioners to bear the entire cost of carrying their lines to the corporate limits of Trent and Flandreau and making physical connection with the lines of the association.

Second. That the rate of compensation to be paid to petitioners for switching services, as fixed by the Board in its final order, is not sufficient to pay the actual cost of such services, and requires the petitioners to perform such services at a loss, thereby taking their property without due process of law, contrary to the provisions of the Constitution of the United States (Amendment 14) and of the Constitution of the state of South Dakota (article 6, § 2).

Third. That requiring them to furnish switching services for the rural lines of the association at the price fixed by the Board requires the petitioners to discriminate in rates for similar telephone services, in that thereby the subscribers on the rural lines of the association would secure telephone services at a lower rate than that charged under direction of the Board for the same class of service rendered subscribers on the rural lines of the petitioners.

As to the expenses of making the physical connection:

[1] Section 9797 of the Revised Code of 1919, as amended by Chap. 294 of the Session Laws of 1919, authorizes the Board, upon application for such connection, to "ascertain the facts in the case and if in its judgment the public service demands such P.U.R.1928E.

connection and the lines of the applicant are in proper condition, such Board shall order such connection to be made and shall apportion the expense thereof."

The evident purpose of the statute is the securing of telephone service for the public. The law requires the applicant seeking connection and switching service to bring its lines to the corporate limits of the city or town in which the exchange is situated. These lines must also be properly constructed and in proper condition to be connected up. The record in this case shows that the applicant association has constructed several miles of line on each of the ends prepared for connection between the phone of its nearest subscriber and the corporate limits. We cannot say that the Board abused its discretion in requiring the petitioners to bear the entire cost of meeting the applicant's lines at the corporate limits.

As to the petitioners' contention that the final order of the Board requires them to furnish switching services at a loss to them and, therefore, results in taking of their property without due process of law, the record shows the following facts:

The findings of the Board include the following statement:

"The rate prescribed in the statute is a maximum per station rate. It was the evident intent of the legislature to establish a reasonable, average maximum rate which would fairly meet the average cost of switching service throughout the state. The record is not sufficiently exhaustive to convince the Board that the prescribed rate is too low to meet such intent."

[2, 3] The petitioners insisted that the evidence submitted is sufficient to show conclusively that the rate is too low to cover the actual cost of the services; that such evidence is wholly undisputed; and that the Board abused its discretion and exceeded its jurisdiction in fixing the switching rate at \$2.25 per year, contrary to all the evidence before it.

The evidence referred to consists of tabulations resulting from so-called "studies" made by employees of these petitioners. In preparing these tabulations, the compilers have charged to the switching cost a certain share or per cent of the cost of maintaining and operating the exchange. The share or per cent so charged is determined by ascertaining the comparative number
P.U.R.1928E.

of calls on rural and urban lines, and charging the rural switching with that proportion of maintenance and operating costs. In this list of costs they include salaries of operators, rent, heat, and light, janitor service, interest on investment, including investment in land on which exchange stands, depreciation, repairs, taxes, income collection, income accounting, a large charge for "General Office Expenses," and various other charges.

To make some of these tabulations, the petitioners selected certain stations of their own choosing, accumulated their data for the six months from December 1, 1919, to May 31, 1920, making no explanation of their reason for selecting that remote period, or for confining their data to that season of the year when heat, light, and janitor services are most expensive.

There was no proof whatever that the furnishing of switching services for the connection ordered would require the employment of additional operators, greater expenditure for heat, light, janitor service or rent, or that investment, taxes, depreciation, or any other item would be required to be increased in the proportions shown in the tabulations. Unless there is evidence to show that the expenses will be increased by an amount in excess of the compensation provided for, there is no proof of loss from the enforcement of the Board's order.

The tabulations merely tend to show that the compensation fixed by the Board's order is less than the average cost of switching at the times and under the conditions covered by the data. This falls far short of proving that the enforcement of the order will cause an actual loss to the petitioners.

In its report in this proceeding, the Board includes the statement that:

"The evidence further indicates that up to a certain point switching service can be furnished at an exchange without appreciably increasing the operating expenses of such exchange, and that between certain limits, the cost per service station of furnishing such service is materially reduced by an increase in the number of stations served."

The Board was fully justified in making this deduction from the evidence and in finding the record insufficient to show that
P.U.R.1928E.

SOUTHWEST BRANCH, ETC. v. DAKOTA CENT. TELEPH. CO. 763

compliance with the order would result in a loss to either of the petitioners.

Only such errors as appear on the face of the record can be reviewed on certiorari. *Van Den Bos v. Board of Comrs.* 11 S. D. 190, 76 N. W. 935.

"The writ does not lie to correct errors of law, such as may arise in passing upon the competency or sufficiency of evidence, which jurisdiction or authority is given to pass upon the questions involved." *Austin v. Eddy*, 41 S. D. 640, 648, 172 N. W. 517.

[4] As to the contention of petitioners that the Board's order requiring switching service to be furnished at the rate fixed "results in direct discrimination in favor of the connecting lines and against the company and its subscribers in the exchange area:"

Section 9798, Revised Code of 1919, provides:

"No person or telegraph or telephone company shall unjustly discriminate either between persons or companies in the switching, transfer or delivery of messages; nor shall any such company make different rates for its subscribers for the same class of service in any city or town where it is operating."

In arguing their contention on this point, counsel for petitioners say:

"In the case at bar it appears that the Rural Reciprocal Telephone Company is furnishing rural service for \$1 less per annum than the Dakota Central is supplying rural service to its subscribers for. As a matter of fact, they could afford to furnish service for about \$3 less than what the Dakota Central must charge its rural subscribers. This results in a direct discrimination in favor of the connecting lines and against the company and its subscribers in the exchange area."

Section 9798, Revised Code, has no application to the conditions involved herein. That section deals with charges which a telephone company makes for service to its own subscribers.

By the enforcement of the Board's order, users of the association phones do not become subscribers of either of the petitioners. They remain subscribers of the association, and those of them who testified at the hearing testified that they were willing
P.U.R.1928E.

to pay the cost of switching in addition to the existing charge.

If there is any necessity for regulation of rates between competing companies, that is a matter not involved herein. If the users of association phones are required to pay the switching charge in addition to the charge of \$14 per year, they will have to pay more than the users of petitioners' phones.

The Board having found that public convenience and necessity require, and public service demands, that the lines be connected, and there being ample evidence in the record to support that finding, and the record failing to show that the Board proceeded irregularly or exceeded its jurisdiction in making the order involved herein, the said order and the proceedings of the Board upon which the said order is based are hereby affirmed.

Burch, P. J., and Polley, Sherwood, and Brown, JJ., concur.

PENNSYLVANIA PUBLIC SERVICE COMMISSION.

RE NORTHWESTERN ELECTRIC SERVICE COMPANY OF PENNSYLVANIA.

[Application Docket No. 18715.]

Service — Abandonment — Street railway — Earnings of other department.

The fact that the electric department of a company operating an electric plant and a street railway is operating at a profit is not a bar to the abandonment of a portion of the street railway being operated at a loss.

Street railways — Duty to continue service — Automobile competition.

Statement that a railway company cannot be expected to lose increasing amounts of money in order to furnish service to comparatively few people who still require it when larger numbers of its former patrons have abandoned it for other means of transportation, p. 766.

[July 3, 1928.]

APPLICATION by a utility operating a joint electric and street railway service for approval of discontinuance of street railway service; approved.

By the Commission: The applicant, in addition to rendering
P.U.R.1928E.

electric service, operates an electric railway from Erie through Meadville and Harmonsburg to Exposition Park on Conneaut lake. It has filed with the Commission an application for approval of the abandonment of its railway service. No hearing has yet been held on that application.

The present proceeding involves the proposed abandonment of railway service on that section of the line extending from Meadville through Harmonsburg to Exposition Park. That section of the line is approximately eleven miles in length. In Meadville it crosses seven railroad tracks, extends approximately two miles on state highway No. 85, then diverges to an unimproved road to Harmonsburg.

Separate consideration of the abandonment of this section of the line is desired because the state highway department proposes to pave a portion of state highway No. 85, which will require the relocation and reconstruction of the railway tracks thereon at an estimated cost of \$27,282.75. The crossings over the railroad tracks in Meadville are in bad shape and immediate reconstruction is necessary if railway service thereover is continued. The estimated cost of this work is \$4,600. The entire section of the line is in a poor state of repair and considerable improvement must be made if operation is to be continued. The total cost of repairs and deferred maintenance, together with the items above mentioned, is estimated at \$52,437.75.

It was testified that this section of the line as well as the entire railway system is being operated at a loss. The total railway receipts for the year ending January 31, 1928, were \$158,158, and the expenditures were \$178,344, producing a deficit of \$20,184. That the decrease in earnings is progressive is indicated by the fact that the deficit for the previous year was \$9,768 and the year 1926 showed a net income of \$6,924.

On the section of the line here under consideration the total revenues for the year ending May 31, 1928, were \$18,140 and the expenses \$26,488, leaving a deficit of \$8,348. The revenue shows a decrease of 34 per cent in the first five months of 1928 as compared with the same months in 1927.

The protestants attempted to show that the electric department of the applicant company is being operated at a profit.
P.U.R.1928E.

Even if this is true, it cannot affect the determination in this proceeding. Persons securing electric service from the applicant company cannot be required to bear the cost of furnishing street railway service to the protestants. Reference was made to the fact that electric wires are carried on the poles of the railway department and no income is received therefor. This might be material if the applicant were claiming the right to earn a fair return upon the value of the poles which are jointly used, but is immaterial in view of the fact that the revenues do not produce any return upon the investment nor meet all the operating costs.

Abandonment of the line is favored by a number of people residing in Meadville and along state highway No. 85. They do not use applicant's road to any great extent and apparently consider the improved highway to be of greater importance to them. Protest against the abandonment was made by persons residing in Harmonsburg and along the road between that town and Meadville. Between the improved highway and Harmonsburg there are about 112 dwellings. About two-thirds of these families possess automobiles. The highway between these points is unimproved. The protestants do not consider service by motor vehicle, whether public or private, to be sufficiently dependable for those persons going regularly to Meadville either for work or to the schools.

Application has been made by the Penn Public Motor Transportation Company, a subsidiary of the applicant company, for approval of motor bus service between Harmonsburg, Exposition Park and Meadville, which approval has recently been granted. This motor bus will serve the people of Harmonsburg and vicinity but, as it does not parallel the railway track, it will not meet the needs of the protestants.

The Commission is reluctant to permit discontinuance of service which, if not a necessity, is at least a great convenience to the number of people here affected. However, under the circumstances here present, and in consideration of the decreasing demand for such service, the continued loss from operation and the relatively large capital expenditures which must be made if operation is to be continued, the Commission can not rea-

P.U.R.1928E.

sonably refuse to permit the applicant company to discontinue service over this portion of its line. The improvement of our highways and the increased use of automobiles has made the operation of this railway, like many other railways in the state, unnecessary to large numbers of people and has thereby reduced its revenues. The railway company cannot be expected to continue to lose increasing amounts of money in order to furnish service to the comparatively few people who still require such service when the larger number of its former patrons have abandoned it for other means of transportation.

From a consideration of the entire record, the Commission finds that the applicant company is justified in abandoning service over the portion of its line here involved, and an order signifying its approval of such abandonment will issue.

CALIFORNIA RAILROAD COMMISSION.

CITY OF SANTA BARBARA

v.

**SOUTHERN COUNTIES GAS COMPANY OF
CALIFORNIA.**

[Case No. 2344.]

RE SOUTHERN COUNTIES GAS COMPANY.

[Case No. 2540.]

[Decision No. 19963.]

Return — Amortization — Depreciation reserve not maintained.

1. Rates should not include any amount for amortization of a gas generating plant rendered nonoperative by the substitution of a natural supply, over and above a depreciation reserve, which would have existed in a much greater amount if properly accounted for since the date of installation, and had the property been operated under one ownership since the inception of the original company, p. 769.

Return — Amortization — Property rendered nonoperative — Sinking-fund basis.

2. The difference between the amount of plant investment rendered nonoperative by substitution of service supply and an amount which P.U.R.1928E.

should have existed in the depreciation reserve had it been properly accounted for since the date of installation, was amortized over a period of ten years on a 6 per cent sinking-fund basis, p. 769.

Valuation — Working capital — Gas utility.

3. The usual basis employed for allowance of working capital for a gas utility is one month's cost of gas and two months' other operating expense, less one-fourth state taxes, p. 771.

Valuation — Property nonoperative — Gas utility.

4. A gas transmission line from a field compressor station which would not become entirely nonoperative upon the depletion of a natural gas supply was included in the rate base, rather than as an element in the cost of gas, p. 771.

Return — Percentage allowed — Gas utility.

5. Rates calculated to yield a return of 7½ per cent on the fair value of gas properties were ordered in effect, p. 773.

Rates — Service charge — Two-part rate — Gas utility.

Discussion of the advantages of two-part rate for gas over the ordinary minimum form of rate, p. 774.

[June 29, 1928.]

COMPLAINT by municipality against alleged excessive rates of gas utility; rates reduced.

Appearances: S. J. Bingham, Joseph M. Berkley and G. R. Kenny, for city of Santa Barbara; LeRoy M. Edwards and A. F. Bridge, for Southern Counties Gas Company; J. J. Deuel and L. S. Wing, for California Farm Bureau Federation.

By the Commission: The above entitled proceedings involve (1) the rates for mixed gas service supplied within the city of Santa Barbara and adjacent unincorporated territory, including Montecito, (2) the rates for natural gas service furnished to unincorporated towns and other territory within the county of Santa Barbara and (3) the substitution of natural gas service for mixed gas service now being served to consumers in the city and the county of Santa Barbara. The complaint of the city of Santa Barbara requests this Commission to make its order requiring Southern Counties Gas Company to reduce the schedule of gas rates applicable to domestic and commercial consumers in the city of Santa Barbara, and to supply natural gas service to all consumers in the city of Santa Barbara.

Public hearings on the city's complaint were held before Commissioner Whitsell on December 6, 1927, and before examiner P.U.R.1928E.

Gannon on February 20 and March 27, 1928, subsequent to which the matter was submitted and is now ready for decision. Public hearing in the matter of the investigation on the Commission's own motion into practices, rates, rules, and operations of the Southern Counties Gas Company, Santa Barbara district, was held before examiner Gannon on May 23, 1928. Evidence introduced at hearings on the city's complaint involved the entire district operation and, following a stipulation by the parties that this evidence might be considered in Case No. 2540, the matter was submitted for decision.

The two proceedings are so intimately connected as parts of a single situation that they have been combined for decision.

Service Conditions.

[1. 2] Prior to November 15, 1923, Southern Counties Gas Company manufactured and distributed oil gas having a heat value of approximately 550 British thermal units per cubic foot, in the city of Santa Barbara, in Montecito, and to contiguous territory. During the latter part of the year 1923 the company constructed a 6-inch natural gas transmission line from the Ventura avenue oil field to its gas works at Santa Barbara. Since the completion of this line a mixture of natural and manufactured gas of approximately 700 B.T.U. per cubic foot has been supplied to its consumers in the city of Santa Barbara, Montecito, and contiguous territory, and natural gas has been supplied to consumers in the towns of Carpinteria, Summerland, and intervening territory traversed by the natural gas transmission line.

Amortization of Production Capital.

The city of Santa Barbara asks that natural gas be substituted for the present mixed gas service. Supplying natural gas service as requested by the city would necessarily result in the furnishing of such service to all consumers in the Santa Barbara district of this company, and would practically result in rendering nonoperative the company's gas generating plant situated in the city of Santa Barbara. The company approves such service of natural gas and proposes several plans for disposition of its generating plant, among which it recommends as most desirable, dismantling and salvaging. In its testimony and exhibits several P.U.R.1928E.

plans of amortizing this capital investment were advanced, based upon the 6-per cent sinking-fund method of accrual, plus 6 per cent interest annually on the sum to be amortized. These plans, resulting in annuities ranging from \$16,548.72 to \$46,464.78, are substantially as follows:

1. To amortize over a 5- or 10-year period the present production plant with the exception of steam driven compressor equipment, boiler and necessary housing.
2. To amortize over a 5- or 10-year period the entire production plant and install new gas engine driven compressor.

The city, in its exhibits, has proposed a 10-year amortization period and abandonment of a portion of the plant corresponding to the first of the above plans. In its claim that \$12,863.27 is a reasonable amortization annuity, the city has first deducted depreciation reserve based upon the depreciation of certain items of production equipment from 1915 to December 31, 1927, while the company's claim is based upon a deduction of depreciation reserve calculated only from the year 1920, when the company acquired control of this property.

While we agree that the entire production plant equipment should be retired, we do not feel that the amortization of substantially all of this capital is fair to the consumers. Had the properties, since the inception of the original company, been operated under one ownership, the reserve for depreciation of production equipment would now be substantially \$100,000 instead of the \$38,275 which has accrued under the management of Southern Counties Gas Company. The consumer should not, in this instance, pay in rates any amount for amortization on production equipment over and above the depreciation reserve which would exist if properly accounted for since date of installation of the property involved. The difference between \$239,999.17, carried on the company's books, and a reserve of \$100,000, less a net salvage of \$10,000, leaves a balance of \$129,999.17.

We conclude, therefore, that \$130,000 of plant investment should be amortized over a period of ten years on the 6-per cent sinking-fund basis. The corresponding annuity and interest charge are provided for in allowed operating expenses.

P.U.R.1928E.

Rate Base.

[3, 4] Though minor discrepancies occur in the estimates of fixed capital introduced by the city and the company, we find that, in general, these estimates are substantially in agreement as to rate base. As stated above, we believe that the interests of the consumer and the utility will best be served by the abandonment of the entire present gas generating plant; and the substitution of a gas engine driven compressor plant for the present steam driven equipment. Inasmuch as the city estimate provided for the retention of a portion of the present production plant in operative capital, we have, after due consideration, accepted the company's fixed capital estimate for rate base purposes. A fair allowance for proposed new gas holder and compressor equipment is reflected therein. It is to be noted, however, that \$115,113.27, the cost of the 6-inch transmission line from Ventura avenue compressor plant to the Santa Barbara county line, has been included under "transmission capital." An allowance for "materials and supplies," which we believe to be reasonable, is shown in Table No. 1, as well as allowance for "working cash" which has been calculated on the usual basis employed by this Commission, *i. e.*, one month's cost of gas, two months' other operating expense, less one-quarter state taxes. A deduction of \$86,000 has been considered reasonable for "consumers' advances in aid of construction."

*Table No. 1
Estimated Rate Base
Southern Counties Gas Company, Santa Barbara District, Year 1928*

Fixed capital—	City Exhibit 2	Company Exhibit 2	Found reasonable
Franchises	\$670.00	\$670.00	\$670.00
Transmission	111,544.00	112,249.21	*227,363.00
Distribution	1,190,199.00	1,171,604.17	1,171,604.00
General	126,272.00	135,988.20	135,988.00
 Totals	\$1,428,685.00	\$1,420,511.58	\$1,535,625.00
Materials and supplies	†\$50,738.00	\$28,400.00	\$28,400.00
Working cash		31,024.00	19,810.00
Less consumers' advances			\$86,000.00
 Rate base	\$1,488,423.00	\$1,479,935.58	\$1,497,835.00

* Includes \$115,133.27 transmission line, from compressor station to Santa Barbara county line.

† Total materials and supplies and working cash.

P.U.R.1928E.

Operating Expenses and Depreciation.

The principal difference between operating expense estimates presented by the city and the company is to be found under "production expense" and "taxes." The variation in production expense results from difference of opinion in the unit cost of gas which the company has estimated at 18.97 cents per M. C.F., and the city at 15.45 cents. These unit costs in both cases purport to be the cost delivered to Santa Barbara district at the Santa Barbara county line. The company presented its claim of 18.97 cents per M. C.F. at some length, basing it upon the theory that early depletion of the natural gas supply is inevitable, and, therefore, in its opinion, the cost of gas should include amortization, over a period of six years, of capital invested in suction lines and compressor plants as well as capital invested in transmission line from compressor plant to Santa Barbara county line.

A rather elaborate study of the amount of gas heretofore produced in the Ventura avenue and South Mountain fields and the amount of gas available to Southern Counties Gas Company, under its present contracts, was testified to by Messrs. R. N. Ferguson and R. Simmons, geologists. Inasmuch as the use of suction lines and compressor plant is common to gas delivered to Los Angeles, Santa Barbara, and other communities served by this company, we feel it proper to amortize these facilities in the cost of gas, and further to include reasonable operating charges. The transmission line from Ventura avenue field compressor station to Santa Barbara county line, amounting to \$115,113.27, will not become entirely nonoperative upon the depletion of the gas supply. It has, therefore, been included in the rate base rather than as an element in the cost of gas. We find, therefore, that 15.96 cents per M. C.F. will adequately provide for the unit cost of gas, and this figure will be used for purposes of this decision.

Allowance for state tax is based on $7\frac{1}{2}$ per cent of gross revenue for the year 1927, which is the usual method employed by this Commission. Federal tax is estimated for the year 1928. This results in a total allowance of \$50,000, which is substantially P.U.R.1928E.

higher than the city's estimate and slightly higher than the estimate submitted by the company.

Estimate of depreciation annuity presented by the city was based upon depreciable property in service December 31, 1927, rather than estimated average depreciable property in service during the year 1928. Except for a few lines applicable to certain classes of property, the city and company are substantially in agreement. Analysis of evidence presented leads us to the conclusion that reasonable depreciation annuity for the year 1928 would be \$37,208, which includes an annuity for the entire Ventura-Santa Barbara transmission line.

*Table No. 2
Estimated operating expenses and Depreciation Annuity, Southern Counties Gas Company, Santa Barbara District, Year 1928*

Operating expenses—	City Exhibit 17	Company Exhibit 4	Found reasonable
Production	\$87,670.00	\$116,316.00	\$101,600.00
Transmission	2,750.00	4,100.00	4,100.00
Distribution	58,900.00	58,885.00	58,885.00
Commercial	30,000.00	30,000.00	30,000.00
New business	7,500.00	9,000.00	7,500.00
General and miscellaneous	20,000.00	22,000.00	22,000.00
Uncollectibles	4,000.00	4,000.00	4,000.00
Taxes	42,000.00	48,930.00	50,000.00
 Totals	 \$252,820.00	 \$293,231.00	 \$278,085.00
Depreciation	26,315.00	34,077.00	37,208.00
Amortization	12,863.00	26,599.00	*17,667.00
 Totals	 \$291,998.00	 \$353,907.00	 \$332,960.00

* On \$130,000 of production property 10 years. Six per cent sinking-fund basis.

Rate of Return.

[5] Both the city and the company introduced evidence dealing with the effect upon revenue which would result through the substitution of natural gas for mixed gas service and the rates necessary in the present mixed gas area to yield a fair return.

We are concerned with rates for the entire Santa Barbara district rather than rates for the city of Santa Barbara alone, and it, therefore, is not necessary to set up the claims made by these parties.

At the hearing on February 20th, C. E. Crenshaw, of the Railroad Commission's engineering department, testified on rate P.U.R.1928E.

base, operating revenue, expense and rate of return for the year 1927, showing the latter to have been 14.74 per cent, which remains uncontradicted in the record.

Based on the above findings of rate base and expenses, it will be seen from the following Table No. 3, that the necessary annual gross revenue is \$445,300.

Table No. 3

Expenses (Table No. 2)	\$332,960.00
Return (7½ per cent on \$1,497,835)	112,338.00
Necessary gross revenue	<u>\$445,298.00</u>

Under present conditions and rates the gross revenue for 1928 would approximate \$580,000, which is considerably in excess of a fair return, as found reasonable.

The rates established in the order accompanying this opinion will yield substantially the amount above found reasonable, bearing in mind that the use of gas will be greatly stimulated, as a result of rate reductions here placed in effect, and the more general use of gas which should follow.

Rates.

The city and the company have both urged that the so-called "two-part rate" be adopted for domestic and commercial service instead of the minimum form of rate which has applied in the past. The city contended for a service charge of \$1 per meter per month, while the company advocated a \$1.50 charge.

Admittedly, the 2-part rate, or a rate embodying its principle, has certain advantages over the ordinary minimum form of rate. The lower commodity charge, which accompanies the 2-part form of rate, makes available additional quantities of gas at lower cost and thereby stimulates usage, to the ultimate benefit of the entire group of consumers. Further, such a rate, if properly designed, more equitably allocates the cost of service among the consumers. Under the ordinary minimum form of rate a certain group of consumers with small usage does not pay its way, and the average consumer pays somewhat more than his share. If this condition is to be corrected, it naturally follows that, for certain usages, increased bills will result, which, in general, is the main cause for objection to the 2-part form of rate.

P.U.R.1928E.

There are other considerations which have a bearing upon the advisability of placing the 2-part form of rate in effect, and to which consideration must be given in any specific instance.

In these proceedings, all interested parties have urged its adoption and the order will so provide. [Order omitted.]

MINNESOTA RAILROAD AND WAREHOUSE COMMISSION.

RE TRI-STATE TELEPHONE & TELEGRAPH COMPANY.

[M-1810.]

Rates — Telephones — Special reference directory listing.

A special rate somewhat less than the rate for the regular extra directory listing was allowed for "special reference listing" in connection with a "Physicians' Exchange" to be associated with the names of various physicians and surgeons of a city for the purpose of rendering 24-hour continuous service to patrons in need of medical attention.

[June 25, 1928.]

APPLICATION of a telephone company for approval of a special reference listing in connection with service furnished by a "Physicians' Exchange;" listing approved and rate reduced.

By the **Commission:** Hearings in the above entitled matter were held in the office of the Commission in the state capitol, Saint Paul, Minnesota, June 5 and 6, 1928, C. B. Randall, General Counsel, appearing for the Tri-State Telephone & Telegraph Company, and Paul Thomas, attorney, appearing for the physicians' service bureau.

The Tri-State Telephone & Telegraph Company is a corporation operating a telephone exchange in the city of Saint Paul, Minnesota, together with an extensive system of local exchanges and toll lines in the southern portion of the state.

The physicians' service bureau is a corporation made up of representative physicians and surgeons of the city of Saint Paul, organized for the purpose of rendering service in the collection of accounts, credit ratings, and furnishing information to the member physicians that their services are desired when the P.U.R.1928E.

bureau is called by a patient. A service enabling patients to locate and secure the service of physicians is now in effect by what is known as the physicians' exchange.

The petitioner seeks approval of the following as a part of its rate schedule for the Saint Paul exchange:

Directory Listings.

Special Reference Listings.

"Special reference listings, immediately following the regular listing of a subscriber's telephone number, are furnished in the alphabetical section of the directory advising a party calling this number to call another number in case of 'no answer.' "

These listings are furnished in connection with business or residence main station, joint user, or private branch exchange service. They are limited to one line in the directory using the following form:

"If no answer call (Name)
..... (Tel. No.)"

"Special reference listing, alphabetical section, per month,
\$1.25."

At the present time an identical reference listing is furnished in connection with the service of the physicians' exchange under the classification in the rate schedule of "extra listings" at the rate of \$1.50 per year.

The special reference listing was placed under the regular extra listing classification more than ten years ago at the extra listing rate of \$1.50 per year without consideration as to the reasonableness of the charge or whether there was any difference in the service provided thereby.

Under the extra listing classification a member of a business firm may have his name entered in the telephone directory as an extra listing and associated with the telephone number of the firm. Such a listing is simply more a matter of convenience to the firm and to those subscribers of the telephone company who may be more familiar with names of the personnel of the firm than with the firm name itself.

The special reference listing refers the subscriber who has
P.U.R.1928E.

been unable to get the firm, member of the firm, or the doctor, as the case may be, because of no answer, to another telephone number where the information service or the location of the party called may be obtained.

Such a listing does provide a different service than the regular extra listing does by reason of making reference to another telephone number in the case of no answer, and will without doubt tend to increase the number of calls.

The rate for special reference listings in other cities varies from 75 cents per month to \$1.75 per month.

At the present time the physicians' exchange and the physicians' service bureau are the only service bureaus using the special reference listing in the telephone directory.

The physicians' service bureau is not yet in operation, but has contracted with the telephone company for the installation of a private branch exchange and the necessary trunk lines, and will render a continuous 24-hour service. It has also contracted for over 176 special reference listings to be associated with the names of physicians and surgeons of the city of Saint Paul, which listings the telephone company has had verified by the various doctors.

The Commission is of the opinion that the special reference listing rate applied for is unreasonably high.

Upon review of the facts, the Commission finds that the special reference listing applied for does not come within the classification of the regular extra listing provided for in the rate schedules of the petitioner; that the rate of \$1.25 per month for the special-reference listing is unreasonable; and that a rate of \$1 per month for such listing is fair and reasonable.

It is therefore *ordered*, that the Tri-State Telephone & Telegraph Company be and is hereby authorized to establish and place in effect as a part of its exchange rate schedules for Saint Paul, Minnesota, the following:

Directory Listings.

Special Reference Listings.

Special reference listings, immediately following the regular
P.U.R.1928E.

listing of a subscribers' telephone number, are furnished in the alphabetical section of the directory advising a party calling this number to call another number in case of "no answer."

These listings are furnished in connection with business or residence main station, joint user or private branch exchange service. They are limited to one line in the directory using the following form:

"If no answer call (Name)
..... (Tel. No.)."

Special reference listing, alphabetical section, per month, \$1.00.

COLORADO PUBLIC UTILITIES COMMISSION.

RE PUBLIC SERVICE COMPANY OF COLORADO.

[Application No. 1133, Decision No. 1833.]

Sale — Commission jurisdiction — Contract of sale.

1. The Commission has no jurisdiction over the purchase and sale of the property of public utilities and, therefore, has no authority to approve a contract between companies with respect to such a transaction, p. 780.

Certificates — Commission jurisdiction — Preliminary order.

2. The Commission has jurisdiction to issue a preliminary order in the event that a public utility desires to exercise the right or privilege under a franchise or ordinance which it contemplates securing but which has not as yet been granted, p. 780.

Certificates — Commission power — Excessive purchase price.

3. It is the power and duty of the Commission in determining whether or not a certificate should be granted authorizing the exercise of rights under a franchise in possession of the purchaser of a public utility, to safeguard the public interest by preventing such utility from getting into a position where it might claim to have the right to earn a return on an unreasonable and excessive purchase price, p. 780.

Franchises — Necessity for certificate — Contractual obligation.

4. No contractual rights exist between a municipality and a public utility based upon a franchise until its certificate of public convenience and necessity is issued by the Commission authorizing the exercise of the rights under such franchise, and a franchise purporting to be obtained previous to the grant of such Commission authority is void, p. 780.

[June 23, 1928.]

APPLICATION of an electric utility for a preliminary order for
P.U.R.1928E.

the issuance of a certificate of public convenience and necessity; granted.

By the Commission: On May 19, 1928, Public Service Company of Colorado filed an application with this Commission in which it is alleged, among other facts, that the applicant is engaged in the business of generating and distributing electric current for light and power purposes in the counties of Alamosa and Conejos, state of Colorado, and is serving the city of Alamosa and utilizing in connection with its distribution system within the county of Conejos a certain transmission line connecting said city or Alamosa and the town of La Jara in Conejos county, said transmission line being owned by the La Jara Electric Company; that on May 8, 1928, applicant entered into a contract with the said the La Jara Electric Company for the purchase of all the physical property of said company, including the transmission line from Alamosa to La Jara, the distribution systems in La Jara and Richfield and all rights-of-way and easements required and used in connection therewith, and the substation in La Jara, together with all appliances used in connection with the same, office equipment, supplies and all rights, franchises, and privileges appurtenant thereto subject, however, to the ratifications of the stockholders of the La Jara Electric Company to be given at a meeting of said stockholders now called to be held on June 9, 1928, and also subject to the order of approval of this Commission.

The application further alleges that the amount agreed to be paid by the Public Service Company for said property is not in excess of the reasonable value thereof; that in the event said contract shall be ratified and the same thereupon be consummated and the approval order of this Commission shall be entered, petitioner contemplates and intends to make application for a new franchise to operate in said town of La Jara; that the applicant is able to generate and distribute electricity at substantially less cost than the La Jara Electric Company, and in the event such purchase and sale shall be consummated it proposes and intends forthwith to file a new schedule of rates with this Commission substantially reducing the rates now prevailing in said town;
P.U.R.1928E.

that it is for this reason and other reasons that the consummation of said contract is in the public interest and in conformity with public convenience and necessity; and that the territory included within the town of La Jara and Richfield and between La Jara and Alamosa is not served by any other utility than the La Jara Electric Company and the applicant.

No protests were filed against this application. The same was set down for hearing June 5, 1928 in the hearing room of the Commission, State Office Building, Denver, Colorado, at which time evidence in support of the same was received.

[1, 2] The Commission has no jurisdiction over the purchase and sale of the property of public utilities and, therefore, has no authority to approve the contract between the La Jara Electric Company and the Public Service Company. It has jurisdiction to issue a preliminary order in the event a public utility desires to exercise a right or privilege under a franchise or ordinance which it contemplates securing but which has not as yet been granted to it. Such order, if and when issued, should declare that the Commission will thereafter, upon application, under such rules and regulations as it may prescribe, issue the desired certificate upon such terms and conditions as it may designate after such public utility has obtained the contemplated franchise or ordinance.

[3] While the Commission does not have any jurisdiction over the purchase and sale, as such, of the property of public utilities, it does have the power and duty in determining whether or not a certificate of public convenience and necessity should be granted authorizing the exercise of rights under a franchise, whether procured by its predecessor or by it, to safeguard the public interest by preventing the utility from getting into a position by which it might have, or claim to have, the right to earn a return on an unreasonable and excessive purchase price.

[4] The testimony shows that in the event the contract in question is ratified by the stockholders, the applicant contemplates and intends to make an application for a new franchise to operate in the town of La Jara. Exhibit No. 4 is a copy of an application by the Public Service Company to the board of trustees of the town of La Jara for the presentation of an ordinance granting the Public Service Company a franchise in said town P.U.R.1928E.

to construct, acquire, maintain and operate, transmit and distribute electricity in said town for light, heat, and power or other purposes. A copy of the contemplated ordinance is contained in this exhibit. The testimony further shows that an ordinance or franchise was granted to the La Jara Electric Company, approved and adopted on the 28th day of September, A. D. 1920, for the period of twenty years. No certificate of public convenience and necessity authorizing the exercise of the rights and privileges under this ordinance was ever obtained by the La Jara Electric Company from this Commission. It is, therefore, null and void and of no effect. No contractual rights exist between a municipality and a public utility based upon a franchise until after a certificate of public convenience and necessity is issued by this Commission authorizing exercise of the rights under such franchise.

The testimony is clear that the applicant contemplates and intends to make an application for a new franchise to operate in said town of La Jara. The La Jara Electric Company and the Public Service Company are the only utilities serving the public in the territory in question with electric energy. An application for a franchise is pending before the board of Trustees of the town of La Jara. If the purchase and sale referred to above is consummated, the applicant intends to file a new schedule of rates with this Commission substantially reducing the rates now prevailing in said town on a similar basis as now prevails in other communities served by the applicant at nearby points.

After a careful consideration of all the evidence, the Commission is of the opinion that the preliminary order prayed for should issue.

**NEW YORK DEPARTMENT OF PUBLIC SERVICE.
STATE DIVISION, PUBLIC SERVICE COMMISSION.**

RE NEW YORK POWER & LIGHT CORPORATION.

[Case No. 4682.]

Consolidation, merger, and sale — Excessive purchase price.

A proposed consolidation of electric utilities at a purchasing price apparently in excess of the fair value of the properties acquired, was disapproved as being opposed to public interest.

[October 11, 1928.]

P.U.R.1928E.

PETITION of an electric company for approval of the Public Service Commission for a proposal to acquire the outstanding capital stock of another electric company; denied.

Appearances: James F. McKinney, general counsel, for petitioner; H. G. Burleigh, Vice-president, and Thomas F. Flynn, engineer for the Ticonderoga Electric Light & Power Company.

Brewster, Commissioner: The petition in this case as filed is for the acquisition of not less than 155 shares of the outstanding capital stock of the Ticonderoga Electric Light & Power Company by the petitioner, New York Power & Light Corporation, pursuant to § 70, Public Service Commission Law.

At the hearing it developed that the petitioner has made arrangements to acquire the remaining outstanding five shares of stock so that all of the stock would be acquired by the petitioner.

A hearing on the petition was held at Albany on May 9, 1928, at which the appearances were as above noted, there being no opposition to the granting of the petition.

General Statement of Facts:

The Ticonderoga Electric Light & Power Company has outstanding capital stock of \$16,000, consisting of 160 shares of the par value of \$100 each. There is no preferred stock nor bonds. The company distributes electricity in the village of Ticonderoga. It has no electric plant, the power being purchased from the Ticonderoga Pulp & Paper Company, located in the village of Ticonderoga. The company has no generating facilities and does not have any interconnection with any transmission line. The plant of the company consists of a pole line, meters, and accessories.

Location:

The village of Ticonderoga and the properties of the Ticonderoga Company are located in Essex county, a short distance south of Crown Point and a short distance north of the village of Hague. The petitioner serves all of the area surrounding the Ticonderoga Company either directly or through its subsidiary, the Port Henry Light, Heat & Power Company. The latter company supplies Crown Point, Port Henry, and Mineville on the north, and the petitioner's plants to the south, which
P.U.R.1928E.

are connected with its high power distribution lines, serve all of its other properties. The acquisition of the Ticonderoga Company, therefore, will form a connecting link between the properties of the petitioner on the south and its subsidiary, the Port Henry Company, on the north.

Ticonderoga is a small village, the principal industry being the Ticonderoga Pulp & Paper Company. There is nothing in the evidence or the petition to show that there is any probability of any considerable increase in domestic consumption in the territory of the Ticonderoga Company. There appears to be no prospect of a greater sale of power for industrial purposes unless present industries are expanded or new industries created in Ticonderoga.

Purpose in Acquiring:

The petitioner states the following reasons for its purchase of the stock of the Ticonderoga Company.

The petitioner is anxious to sell additional energy which it has from its existing developments, and after purchase would furnish this energy instead of taking power from the Ticonderoga Pulp & Paper Company, which company can utilize the surplus power now sold to the lighting company. The paper company has discussed the possibility of purchasing power from the petitioner. The purchase would consolidate the properties of the petitioner's subsidiary at Port Henry and Crown Point on the north with the petitioner's properties on the south and permit the petitioner to extend a high power transmission line across the territory of the Ticonderoga Company to supply the Port Henry Company with power from its high power line to the south. This would reduce the cost of the power supply of the Port Henry Company.

Valuation:

An appraisal made by engineers for the Ticonderoga Company has been filed with the Commission. The appraisal has been checked by the Engineering and Accounting divisions, the property being examined by the engineering division and the books by the accounting division, and as a result of these examinations, the properties so proposed to be acquired by the purchase of the outstanding capital stock appear to have a value as of December 31, 1927, as follows:

P.U.R.1928E.

Fixed capital—electric	\$105,392.88
Cash	723.71
Accounts receivable	7,313.51
Materials and supplies	1,495.27
	<u>\$114,925.37</u>
<i>Less</i>	
Notes payable	\$31,985.00
Accounts payable	10,298.03
Federal income tax liability	823.25
Interest accrued	307.55
Retirement reserve	8,643.14
Reserve for contribution for extensions	2,404.72
	<u>54,461.60</u>

making the value of 160 shares of common capital stock worth \$60,463.68 or \$377.898 per share.

The value of 155 shares proposed to be purchased for the sum of \$275,000 appears to be \$58,574.19. The appraisal carries items for organization, engineering, and superintendence, law expenditures during construction, and interest during construction.

The petitioner's proposal to pay for 155 shares the sum of \$275,000 is at the rate of \$1,774.19 per share. If we assume that payment will be made on a like basis for the remaining five shares outstanding, it would increase the purchase price \$8,870.95, making the total purchase price \$283,870.95, which is more than four and one-half times the valuation of the property, if we accept the appraisal filed by the Ticonderoga Company.

Earnings:

The income statement for the year ending December 31, 1927, is as follows:

Operating revenues	\$57,719.53
Operating expenses	48,219.67
	<u>Net from operations</u>
	\$9,499.86
Nonoperating revenue	None
Gross income	\$9,499.86
Interest and income deductions	1,902.50
	<u>Net income</u>
	\$7,597.36

Discussion:

The petitioner states as one of the reasons for the acquisition of the property, that it could consolidate it with its other properties, thereby rendering better service to the public. It is probably true that there would be advantages to the public in Ticonderoga in having a source of power such as that which could be
P.U.R.1928E.

furnished by the petitioner and the advantage of the engineering and commercial experience of the petitioner's representatives. There does not appear to be any likelihood, however, of thereby reducing the rates charged for electricity for domestic consumption in Ticonderoga. The evidence shows that the rate in Ticonderoga is approximately ten cents a kilowatt-hour for residential lighting as against a little over thirteen cents net in Port Henry. The cooking and refrigeration rate in Port Henry is 5 cents for the first 20 kilowatt-hours, 4 cents for the next 5 kilowatt-hours and 3 cents for all over 25 kilowatt-hours, with a 10 per cent discount. The rate in Ticonderoga is $4\frac{1}{2}$ cents. The retail power rates in Port Henry are slightly lower than the present rates in Ticonderoga.

There is nothing in the evidence to show where the income derived from the Ticonderoga property could be greatly increased. It is stated that there has been some discussion by the Ticonderoga Pulp & Paper Company (owned by the International Paper Company) of the purchase of power from the petitioner. There appears to be, however, no immediate prospect of this, and in fact, the contrary would seem to be the case. The Ticonderoga Pulp & Paper Company furnishes power to the Ticonderoga Electric Light & Power Company. If the petition herein is granted and power for the Ticonderoga Electric Company is furnished by the petitioner, it would release to the Ticonderoga Paper Company the surplus power now sold to the electric company, and this surplus power, together with the power which it now has, would seem to be sufficient for the present requirements. While there was some discussion as to a possible further development by the International Paper Company at Ticonderoga, nothing definite or specific was disclosed. Ticonderoga is not a rapidly growing community and as has been said, it has few industries and not a large sale of electricity for power purposes, nor is there any evidence that domestic consumption could be increased materially.

As to the construction by the petitioner of a high power transmission line to connect its properties on the south with the Port Henry property and furnish a more reliable and cheaper source of power to the Port Henry Company, it does not seem neces-

P.U.R.1928E.

sary for the petitioner to pay the very high price which it proposes to pay in this case to acquire the Ticonderoga Company.

The petitioner could, by securing a franchise therefor from the village of Ticonderoga, construct a transmission line. Such a transmission line which did not distribute electricity in the village of Ticonderoga would not be a competitor of the existing service company. The cost of construction of such transmission line would be no greater than it would be if the petitioner acquired the stock of the Ticonderoga Company. The reason given does not seem to justify the price proposed to be paid for the stock of the Ticonderoga Company at more than four and one-half times any possible valuation thereof based on the appraisal, which valuation is considerably higher than book value.

While not of record in this case, it is common knowledge that there is at present in the state of New York, a competitive struggle between several large utility corporations for the acquisition of the property and franchises of single electric distributing units. This competition seems to have induced the offering of prices for these single operating units beyond the possibility of any reasonable return thereon. Such a condition is certainly not in the interest of the public, and it is hard to conceive how it is in the interest of the stockholders of the companies making the offers. Probably it is not the duty of this Commission to act in the interest of the stockholders who are represented by boards of directors selected by them. It is, however, clearly the duty of this Commission, under § 70 of the Public Service Commission Law, to make thorough examination of the facts and protect the interests of the public, and where the price to be paid is greatly in excess of the fair value of the property represented by the stock, it is our opinion that the public interest requires the disapproval of the application, unless it be shown that a good and sufficient reason for the granting of the petition exists independent of the fair value of the property and that the consuming public will be benefited thereby. The right to grant or withhold permission given in § 70, Public Service Commission Law, carries with it the exercise of discretion in the discharge of a public duty.

While the granting of the present application might not per-

P.U.R.1928E.

mit the petitioner to use the purchase price as a rate base in a subsequent proceeding, we believe that the proposed purchase at a price so largely in excess of the fair value of the property represented by such stock, is not beneficial to the public interest but detrimental thereto.

Conclusion:

The petition should be denied.

Chairman Prendergast and Commissioner Van Namee concur;
Commissioners Pooley and Lunn not present.

NEBRASKA SUPREME COURT.

FARMERS' & MERCHANTS' TELEPHONE COMPANY
OF ALMA

v.

ORLEANS COMMUNITY CLUB OF ORLEANS.

[No. 25479.]

(— Neb. —, 218 N. W. 583.)

Public utilities — Common carriers — Telephones.

1. Under our Constitution and statutes telephone companies are "common carriers," p. 788.

Commissions — Jurisdiction over telephone company.

2. Telephone companies operating in this state are subject to all reasonable orders of the State Railway Commission, entered upon hearings duly and legally had, as to rates to be charged, and time and manner of service to be rendered; and such orders will not be disturbed unless clearly wrong, p. 789.

Appeal and review — Conclusiveness of Commission findings — Telephones.

3. Evidence examined, and found sufficient to sustain the findings and order of the State Railway Commission as to conditions involved, the rate established, and the necessity for the service sought, p. 789.

[March 14, 1928.]

Headnotes by the COURT.

APPEAL from order of the State Railway Commission sustaining complaint against telephone company; affirmed.
P.U.R.1928E.

Appearances: R. L. Keester, of Alma, for plaintiff in error; Hugh La Master, of Tecumseh, for defendant in error.

Heard before Goss, C. J., and Rose, Good, Thompson, Eberly, and Howell, JJ.

Thompson, J.: Complaint was filed with the Nebraska State Railway Commission (hereinafter called Commission) by the Community Club of Orleans (an association of its citizens and property-holders), appellee, against the Farmers' & Merchants' Telephone Company, appellant, incorporated under the laws of this state for the purpose indicated by its name, and doing business as such in Harlan and surrounding counties, in the former of which the village of Orleans is situate. Appellee prayed that appellant be required to furnish 24-hour service on Sundays and holidays, as then furnished on week days, at Orleans, and that a compensatory rate for such services be fixed. On such complaint issues were joined, hearing had, and order entered as by appellee prayed, save and except four legal holidays, which we find from the record to be what are known as "Decoration Day, Fourth of July, Thanksgiving, and Christmas." To reverse this judgment the action is brought to this court, and the following claimed errors, in substance, are presented: The Commission was without jurisdiction; and its judgment is contrary to the evidence and to the law applicable thereto.

[1, 2] We have considered the facts as reflected by the record, as well as the law applicable thereto, and conclude that the Commission was acting within the scope of its authority. Sections 6107, 6124, 6128, and 6139, Rev. St. 1913, now respectively §§ 5466, 5483, 5487, and 5498, Comp. St. 1922; Hooper Teleph. Co. v. Nebraska Teleph. Co. 96 Neb. 245, 147 N. W. 674; Marquis v. Polk County Teleph. Co. 100 Neb. 140, 158 N. W. 927. Especially are we led to this conclusion when we consider the above citations in connection with article 4, § 20, Constitution of Nebraska, wherein it is provided:

"The powers and duties of such [Railway] Commission shall include the regulation of rates, service and general control of common carriers [such common carriers being defined by § 5483, Comp. St. 1922, as including telephone companies] as the legis-
P.U.R.1928E.

lature may provide by law. But, in the absence of specific legislation, the Commission shall exercise the powers and perform the duties enumerated in this provision."

[3] We further find that there was evidence sufficient to warrant the conclusion reached as to conditions involved, the rate established, and the necessity for the service sought on each Sabbath day and each holiday, other than those holidays heretofore indicated as excluded. In arriving at this determination we have not been unmindful of § 9795, Comp. St. 1922, which provides in part:

"If any person of the age of fourteen years or upward shall be found on the first day of the week, commonly called Sunday, at common labor (work of necessity and charity only excepted) he or she shall be fined," etc.

However, as the Commission found on competent evidence, as above indicated, that the service sought was a "work of necessity," and as we held in *Byington v. Chicago, R. I. & P. R. Co.* 96 Neb. 584, 148 N. W. 520, that "such orders [of the Commission] will not be reversed unless it affirmatively appears from the record that they are clearly wrong" (which we do not find herein), it necessarily follows that the instant case is one within the above statutory exception.

The judgment of the Railway Commission is right, and is affirmed.

MASSACHUSETTS DEPARTMENT OF PUBLIC UTILITIES.

RE B. L. MacDONALD et al.

[D. P. U. 3245.]

Telephones — Merging of exchanges — Lack of popular approval.

A telephone exchange of a community near by another community but separated from the latter for over twenty years at the wishes of its representatives, was not permitted to be merged into the neighboring system where two popular referendums revealed a majority of subscribers opposed to the change, which would result in increased rates for its subscribers of both exchanges.

(GOLDBERG, Commissioner, dissents.)

[November 9, 1928.]

P.U.R.1928E.

PETITION for the merging of telephone exchanges of two communities; petition dismissed.

By the Department: More than twenty years ago the town of Andover, on the initiative of its representatives, was separated from the Lawrence exchange and became a separate exchange. That status has since continued. In the fall of 1925 a referendum of all the telephone subscribers of Andover was held on the question of making that town a part of the Lawrence exchange. Eighty-five per cent of the total number of subscribers voted. Fifty-two per cent of them, constituting approximately forty-five per cent of the total number of subscribers, voted in favor of the change. Of those voting, 43.4 per cent of the business subscribers and 54 per cent of the residential subscribers were in favor of the change. We were then of the opinion that the view of the Andover subscribers was not sufficiently pronounced in favor of a change to warrant us in taking action.

This spring, another referendum on the question was held among the Andover subscribers. The result was the same as the former referendum, fifty-two per cent voting for the change. Of those voting, 34.2 per cent of the business subscribers and 55.3 per cent of the residential subscribers were in favor of the change.

If Andover were made part of the Lawrence exchange, the latter because of the added number of subscribers, would automatically, under the classification of rates, be moved into the next higher group carrying higher rates. The result would be that all Lawrence business subscribers having one-party lines, unlimited, would have their rates increased 50 cents a month and those having the 15-party lines would be increased 25 cents a month. Andover business subscribers having one-party lines, unlimited, would receive an increase of \$2.50 per month; the 15 or more party lines, unlimited, would be increased 75 cents a month, and the 2-party lines, unlimited, would be abolished. All Andover residence subscribers, except those having 4-party lines, would receive an increase of 50 cents a month. The latter would be increased 25 cents a month.

We are of the opinion that a change involving, among other
P.U.R.1928E.

things, a substantial increase in rates should not be put into effect unless at least a more pronounced majority of the subscribers show a desire for such change. Accordingly, the petition is hereby dismissed and it is so ordered.

Goldberg, Commissioner, dissenting: I dissent from the view of my associates. Methuen and North Andover are now part of the Lawrence exchange. Andover's geographical relation to Lawrence is such that, in my opinion, it should logically be as much a part of the Lawrence exchange as Methuen and North Andover.

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK.

QUEENS BOROUGH GAS & ELECTRIC COMPANY

v.

WILLIAM A. PRENDERGAST et al.

[In Equity No. 1276.]

(— F. (2d) —.)

Apportionment — Gas and electric departments — Annual report.

1. An apportionment of the operating cost and plant investment by a utility between its gas and electric departments respectively, which had been accepted as the proper basis by the Commission without objection in the annual reports of the company, was held to be the proper basis for computing the production cost of gas alone, where no specific instances of erroneous apportionment were shown, p. 792.

Apportionment — Allocation of gas plant — Various counties — Confiscation.

2. A contention that a gas company operating in more than one county could not attack as confiscatory, a statute regulating the maximum to be charged in one county because of failure of the company to allocate the plant investment and production cost in the county to which the statute applied, as opposed to such figures for its general business, was overruled where the physical segregation of the company's plant with respect to each county was impossible, and where a theoretical allocation of costs and values would be impracticable, and where the margin of confiscation was so great that no defensible allocation of costs and values between the two counties could change the result, p. 793.

[November 8, 1928.]

SUIT by a gas and electric company against the members of P.U.R.1928E.

the Public Service Commission of New York and the Attorney General of New York to enjoin the enforcement of a statute fixing a maximum rate for gas; report of Special Master recommending a decree for the company approved with modification, and decree entered as recommended in such report.

Appearances: Whitman, Ottinger, Ransom, Coulson & Goetz, of New York city (Jacob H. Goetz, of counsel) for plaintiff; Charles G. Blakeslee, of Binghamton, (Charles E. Murphy, of Brooklyn, of counsel) for defendant Public Service Commission of the state of New York; John Holley Clark, Jr., of New York city (Francis R. Stoddard, Special Deputy Attorney General, of counsel) for defendant Attorney General of the State of New York.

Before Swan, Circuit Judge, and Campbell and Inch, District Judges, holding court pursuant to § 266 of the Judicial Code.

Swan, Circuit Judge: The bill of complaint challenges the constitutionality of Chap. 899 of New York Laws of 1923, effective June 2, 1923, on the ground that it (1) impairs the obligation of a contract, (2) is confiscatory, and (3) denies to plaintiff the equal protection of the laws. The Master correctly rejected the first contention, and properly confined his decision to the question of confiscation. *Brooklyn Union Gas Co. v. Prendergast*, 7 F. (2d) 628, P.U.R.1926A, 412, aff'd. 227 U. S. 579, 71 L. ed. 249, P.U.R.1927A, 39, 47 Sup. Ct. Rep. 199; *Ottinger v. Consolidated Gas Co.* 272 U. S. 576, 71 L. ed. 248, P.U.R. 1927A, 37, 47 Sup. Ct. Rep. 198. He found that enforcement of the statute would result in confiscation and he recommended a decree enjoining both the rate and the standard which the statute prescribes. To his report the defendants have filed numerous exceptions, and the cause is now before us upon these exceptions and the plaintiff's motion for confirmation of the report.

[1] Although the statute in question has been held to be confiscatory in its application to other corporations distributing gas within New York city,—the decisions being cited in the opinion of the Special Master under the appellation of the "Gas Cases"—it is contended by the defendants that the present case is dis-

P.U.R.1928E.

tinguishable on its facts and that the plaintiff has failed to prove the statutory rate and standard to be confiscatory as to it. As one basis for this contention it is urged that the plaintiff has made no proper segregation between its electric business and that part of its gas business which is subject to the statute. The principle that the respective costs of the two services must be considered separately is conceded. See Municipal Gas Co. v. Public Service Commission, 225 N. Y. 89, P.U.R.1919C, 364, 121 N. E. 772. In attempted conformity with that principle, plaintiff has distributed upon its books of account between the gas and electric departments its operating and capital charges, charging to each department such expenditures as are identifiable with it and apportioning equally between the two such charges as are incurred for both in common. The Master has found that this basis of apportionment is shown by plaintiff's testimony to be proper. It is the same basis as that approved by the Public Service Commission in February, 1923, in connection with the purchase of plaintiff's common stock by the Long Island Lighting Company, and is the basis which has been used in plaintiff's annual reports to the Commission, without objection by it. The defendants now charge that the division is arbitrary, but they have adduced no specific instances of erroneous apportionment. The Master's decision on this subject is correct.

[2] Another and more serious basis for the contention that plaintiff has failed in its proof is the argument that there is no evidence of the operating cost of business in Queens county only or of the value of property used and useful in supplying consumers in Queens county. The plaintiff serves consumers of gas in Queens county, to which territory the statute is applicable, and also consumers in a contiguous area in Nassau county which is outside the city of New York and so beyond the reach of the statute. All of the gas sold by the plaintiff is manufactured in a single plant and is distributed through a unified system of mains to consumers in both counties. Shortly prior to the passage of the statute in question the Public Service Commission had authorized the plaintiff to charge its customers a uniform rate of \$1.30 per thousand cubic feet of gas (with steps down to \$1.10 for larger quantities) whether the customers were located P.U.R.1928E.

in Nassau or in Queens. The plaintiff operates its gas plant as a unitary system and in making proof of its operating expenses and of its capital values made no attempt to allocate costs and values between service to Nassau consumers and service to Queens consumers. It proved, however, the quantity of gas sold in each county during the several periods under consideration, and the relative demand made by each county upon the plaintiff's plant. Relying upon such authorities as Knoxville v. Knoxville Water Co. 212 U. S. 1, 12, 13, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Minnesota Rate Cases, 230 U. S. 352, 435, 57 L. ed. 1511, 33 Sup. Ct. Rep. 729, 48 L.R.A.(N.S.) 1151, Ann. Cas. 1916A, 18; Banton v. Belt Line R. Co. 268 U. S. 413, 421, 69 L. ed. 1020, P.U.R.1926A, 317, 45 Sup. Ct. Rep. 534, the defendants contend that in order to prove its case the plaintiff should be compelled to prove the reasonable costs and the value of the property used and useful in serving its consumers of gas in Queens County alone, and that the bill of complaint should be dismissed or the proofs reopened so that plaintiff may cure its failure to furnish such facts.

The Master found (Finding 70) that the net necessary and reasonable operating cost of supplying in both counties gas of the quality actually furnished, after deducting miscellaneous operating revenues, and exclusive of any return whatever upon the property or investment of the plaintiff, was as follows:

	Per M. c.f. of gas sold
Calendar year	1922 \$1.0587
Year ending May 31	1923 .9952
Calendar year	1923 1.0239
" "	1924 .9397
" "	1925 1.0214

He found that the cost would be greater if the plaintiff were to comply with the statutory standard of 650 B.T.U. He concluded from these facts alone that the statutory rate of \$1 for gas sold in Queens county is shown to be confiscatory as to the plaintiff.

The defendants say that this conclusion involves an assumption that the unit of cost for manufacturing and selling gas in Queens county is the same as in Nassau, and to prove the falsity of such assumption they introduced the testimony of their expert, P.U.R.1928E.

Mr. Little, to the effect that it would cost more to manufacture and deliver gas for the Nassau area than for the Queens area. He stated that there was no exact way to figure the additional cost but he estimated it at 6.5 cents per thousand cubic feet. He testified further that the wide fluctuations between the low winter demand and the peak summer demand in Queens county would require a larger investment for plant capacity to be allocated to Queens than to Nassau, where the load throughout the year is more even, and, therefore, if a theoretical apportionment of both investment and operating expenses were made, he concludes: "Approximately, I would say there would be no material difference in the cost as between the two counties, when you take into account investment as well as operating charges." Mr. Little's estimate of 6.5 cents additional operating cost for service in Nassau was disputed by Mr. Davies, plaintiff's gas superintendent. Moreover, some additional expense, though how much does not appear, would be incurred by supplying in Queens county gas of the statutory standard of 650 B.T.U. But even if it be assumed that a proper allocation of operating expenses between the Queens and the Nassau territory would reduce the cost of gas supplied to Queens consumers by the total amount of Mr. Little's estimate of 6.5 cents, the operating cost of approximately 99 cents found by the Master would be reduced only to 92½ cents per thousand cubic feet. On a dollar rate, this would leave a profit of only 7½ cents per thousand cubic feet of gas sold to cover return on plaintiff's investment used and useful in supplying gas to Queens county consumers. In the calendar year 1923 the amount of gas sold by plaintiff to Queens consumers was 563,284,900 cubic feet. The profit on this quantity at 7½ cents per thousand cubic feet would be \$42,246.37. This would be a return of slightly less than 4½ per cent upon a capital investment of \$1,000,000. Under the evidence bearing upon the valuation of plaintiff's properties, no one could seriously urge that the value of so much of plaintiff's plant as is used and useful in supplying gas to Queens consumers is less than one million dollars, or that a rate which gave a return such as the above estimate was not confiscatory. The most extreme claim made by defendants, based upon the purchase of plaintiff's common stock by the Long Island P.U.R.1928E.

Lighting Company with the approval of the Public Service Commission, concedes that the true market value as of June 1, 1923, of the property allocatable to Queens county business was \$1,880,000; and this figure was arrived at by allocating to Queens only 50 per cent of the total property valuation, although the Queens consumers create nearly 75 per cent of the maximum demand upon the plant.

Physical segregation of the plaintiff's plant with respect to the business done in each county is impossible. A theoretical allocation of costs and values would, according to Mr. Little's testimony, be a guess at the best and would serve no practicable purpose. To say, as defendants do, that a corporation which has honestly kept and reported its accounts for years in the manner required by the state officers having authority to regulate the manner of keeping and reporting accounts, namely, the Public Service Commission, cannot escape confiscation because it cannot make an allocation of costs and values with respect to its business in different counties, when the defendants' expert says such allocation is impracticable, seems a very harsh doctrine and is one which we should be reluctant to announce. The present record does not compel it. If the plaintiff may not treat its business as a unit but must show that the portion of it subject to the statute cannot be operated at the statutory rate without confiscation, as defendants contend, we think it has adequately carried that burden. The evidence shows that plaintiff's actual and reasonable operating cost for the entire system is 99 cents per thousand cubic feet—assuming for the present that the Master's finding of this figure is correct—and that to comply with the statutory standard of 650 B.T.U. would increase the cost; that the maximum of cost attributable to Nassau territory in excess of the average for both counties is 6.5 cents per thousand cubic feet; that the total property value as of the day preceding the date when the statute took effect was, on the theory most favorable to defendants, \$3,760,000, on the theory of reproduction cost less depreciation, as figured by defendants' expert, \$6,790,000, and on the figures adopted by the Master, \$8,142,000; and that at the least one-half of the total value should be attributed to the property used and useful for Queens P.U.R.1928E.

county business. It further appears that if the actual operating costs for the entire system were apportioned between the two counties upon the ratio of the sales of gas in each, no substantial difference in the cost of service between the two territories would be shown. These facts are sufficient to prove that the application of the statutory rate to Queens county business would preclude any adequate return on the value of the property attributable to that business. And the margin of confiscation is so great that no defensible allocation of costs and values between the two counties could change the result. Consequently, we think it would be futile and we hold it to be unnecessary to require the plaintiff to prove a more exact apportionment of operating costs and capital values between its Queens county and Nassau county business.

The foregoing argument has proceeded upon the assumption of the correctness of the Master's finding of the unit of operating cost for both counties as 99 cents per thousand cubic feet of gas sold. The defendants' exceptions challenge that finding. They do not deny that the plaintiff actually incurred every item of expense as claimed, nor have they introduced evidence to question the reasonableness of any item; but they contend in argument that some of the expenditures appear upon their face to be unusual and non-recurrent. Most of the questions thus raised have been decided adversely to the defendants' contentions in the earlier "Gas Cases" and it would serve no useful purpose to discuss them in this opinion. If all items, the inclusion of which may be doubtful, are eliminated the rate will be affected by only a few cents and the confiscatory effect of the statute will remain unchanged.

The Master has carefully considered the value of the property used and useful in plaintiff's gas business and the rate of return to which plaintiff is entitled. Without in any sense intimating any disagreement with his conclusions as to the evidence or the law, we think it unnecessary for the court to go into these questions because finding of the cost of operation is such as to preclude a fair return upon a valuation which the defendants do not question, namely, a valuation of \$3,760,000, at least one-half P.U.R.1928E.

of which is attributable to property used and useful in plaintiff's business in Queens county.

That the standard of 650 B.T.U. is inseparable from the statutory rate has been previously decided in this district. Brooklyn Union Gas Co. v. Prendergast, 7 F. (2d) 628, P.U.R. 1926A, 412; Kings County Lighting Co. v. Prendergast, 7 F. (2d) 192, P.U.R. 1925C, 705, P.U.R. 1925E, 5.

The report is approved except as to the findings relating to the value of plaintiff's property. In lieu thereof it is found that the value of plaintiff's property used and useful in its gas business was as of the date of June 1, 1923, and still is at least the sum of \$3,760,000 and that the value of plaintiff's property used and useful in supplying gas to consumers in Queens county was as of June 1, 1923, and still is at least the sum of \$1,880,000. It is also found that the net necessary and reasonable operating cost of supplying gas in Queens county of the quality actually furnished, after deducting miscellaneous operating revenues, and exclusive of any return upon the property of plaintiff was as follows:

	Per M. c. f. of gas sold
Calendar year 1922 not less than	\$9937
Year ending May 31, 1923 " " "	9302
Calendar year 1923 " " "	9589
" " 1924 " " "	8747
" " 1925 " " "	9564

As thus modified the report is affirmed and a decree will be entered as recommended in the report.

This cause came on to be heard at a term of this Court, convened in accordance with § 380, Title 28, United States Code of Laws, Judicial Code and Judiciary (former § 266 of the Judicial Code), and was argued by counsel; and thereupon, upon consideration thereof, it is unanimously

Ordered, adjudged and decreed:

I. (a) In lieu of the findings in the report and opinion of the Special Master, dated May 2, 1928, and filed herein, relating to the value of the plaintiff's property, it is hereby found that the value of the plaintiff's property used and useful in its gas business was, as of June 1, 1923, and still is, at least the sum P.U.R. 1928E.

of \$3,760,000, and that the value of the plaintiff's property used and useful in supplying gas to consumers in Queens county was as of June 1, 1923, and still is, at least the sum of \$1,880,000. It is also hereby found that the net necessary and reasonable operating cost of supplying gas in Queens county of the quality actually furnished, after deducting miscellaneous operating revenues, and exclusive of any return upon the property of the plaintiff, was as follows:

		Per M. c. f. of gas sold.
Calendar year	1922 not less than	\$.9937
Year ending May 31, 1923	" " "	.9302
Calendar year	1923 " " "	.9589
" "	1924 " " "	.8747
" "	1925 " " "	.9564

(b) For the reasons set forth in the opinion filed herein November 8, 1928, it has not been found necessary to pass upon the correctness of the Special Master's findings so far as they relate (1) to the total value of the property on which the plaintiff claims to be entitled to a fair return through gas rates chargeable to its consumers, and to the portion thereof used and useful in the plaintiff's gas business within the borough of Queens, city of New York; or (2) to the total amount of operating expenses entering into the cost of manufacturing and distributing gas furnished by the plaintiff in said borough of Queens; or (3) to the reasonable and proper rate of return upon the present value of the plant, distributing system and other properties owned by the plaintiff, and used and useful in its gas business, which rate of return said Special Master found to be not less than eight per cent per annum; consequently exceptions of the defendants to such findings of the Special Master are not passed upon, and this decree shall be without prejudice to either party as to any matter respecting which the defendants' exceptions have not been passed upon herein, in any subsequent determination of a reasonable rate to be charged for gas furnished by the plaintiff to its consumers.

(c) All exceptions filed by the defendants or either of them and not hereinbefore referred to are hereby overruled.

II. Except as otherwise hereinbefore indicated, the said report and opinion of the Special Master is hereby confirmed.

P.U.R.1928E.

III. A maximum rate of \$1 per thousand cubic feet of gas sold by the plaintiff, in conjunction with or apart from the standard of 650 minimum B.T.U. per cubic foot, is illegal and void, for the reason that it is in contravention of the 14th Amendment of the Constitution of the United States, because enforcement thereof would result in confiscation of the property owned and used by the plaintiff in its gas business; and the provisions of Chap. 480 of the Laws of 1910 of the state of New York, known as the Public Service Commission Law, as amended and supplemented, and of Chap. 899 of the Laws of 1923, in so far as they prohibit the plaintiff from charging or receiving for gas manufactured and sold in the city of New York, a sum, per one thousand cubic feet, in excess of the rate of one dollar per thousand cubic feet, in conjunction with or apart from the said standard, are each likewise and for the same reason illegal and void.

IV. A standard of gas, required to be furnished by the plaintiff, of not less than 650 B.T.U. per cubic foot, in conjunction with a rate not exceeding \$1 per thousand cubic feet of gas, is likewise and for the same reason illegal, unconstitutional and void, on the ground that enforcement thereof would result in confiscation as aforesaid; and the provisions of the said Chap. 480 of the Laws of 1910, as amended and supplemented and of Chap. 899 of the Laws of 1923, in so far as they prohibit the plaintiff from furnishing gas of a standard less than 650 B.T.U. per cubic foot, measured under normal conditions of temperature and atmospheric pressure, in conjunction with the rate prescribed thereby, are likewise and for the same reason illegal and void.

V. The provisions of Chap. 480 of the Laws of 1910, as amended and supplemented, and of Chap. 899 of the Laws of 1923, in so far as they prohibited or prohibit the plaintiff from furnishing gas of a standard less than 650 B.T.U. per cubic foot, without affording the plaintiff an opportunity and a reasonable time within which to make, or to have its consumers make, such readjustment of and changes in the gas appliances of the consumers as might be necessary in order to adapt them for the safe and efficient use of gas of such standard and to protect the consuming public against the very obvious and serious dangers to human life and property, or in so far as they denied to the P.U.R.1928E.

plaintiff a safe and adequate judicial review of the legality thereof without incurring the penalties provided by the said statutes, are likewise and for the same reason illegal and void.

VI. The said Chap. 480 of the Laws of 1910, as amended and supplemented, or any other provisions of law, or any regulation prescribed thereunder, in so far as it prohibits the plaintiff from putting into effect forthwith a rate or rates for gas distributed or sold by it which will afford to it just compensation therefor, is likewise and for the same reason illegal and void.

VII. The plaintiff has no adequate remedy at law for the injury which will result from the enforcement of said acts, and such injury will be irreparable.

VIII. The defendants William A. Prendergast, William R. Pooley, George R. Van Namee, George R. Lunn, and Neal Brewster, constituting the Public Service Commission, being the State Division of the Department of Public Service of the state of New York, and Albert Ottinger, as Attorney-General of the state of New York, and each of them, and their, and each of their successors in office, their deputies and attorneys, and their, and each of their successors, servants, and employees, and any and every person acting or purporting to act under or by virtue of the authority of Chap. 480 of the Laws of the State of New York of 1910, as amended and supplemented, or any other or different provisions of law, be, and each of them is, hereby restrained and enjoined:

(1) From in any way enforcing or attempting to enforce against the plaintiff a rate for gas furnished by the plaintiff to its general consumers of not more than one dollar per thousand cubic feet of gas sold, under the provisions of the said acts or otherwise;

(2) From in any way enforcing or attempting to enforce against the plaintiff the provisions of the said acts, in so far as they prohibit the plaintiff from charging or receiving for gas furnished in the city of New York, a sum, per one thousand cubic feet, in excess of \$1, in conjunction with or apart from the said standard of gas;

(3) From enforcing or attempting to enforce against the plaintiff a standard of gas furnished by the plaintiff of not less

than 650 B.T.U. per cubic foot, or the provisions of the said acts in so far as they prohibit the plaintiff from furnishing a gas of a standard less than 650 B.T.U. per cubic foot, measured under normal conditions of temperature and atmospheric pressure;

(4) From bringing any action or proceeding to enforce the said penalties against the plaintiff, or by mandamus or injunction or otherwise, to compel compliance by the plaintiff with the provisions of the said acts, or any of them, relative to the said maximum rates or charges;

(5) From doing any act or thing interfering with the right or authority of the plaintiff forthwith to furnish gas of any standard which it may lawfully furnish and to charge or receive for gas furnished by it any rate which it may lawfully charge or receive, any provisions of the said acts or of any regulations prescribed thereunder relative to the rate to be charged and received or to the standard of gas to be furnished by the plaintiff, to the contrary notwithstanding.

IX. At any time while the injunction herein granted remains in force, any party hereto or his or its successors or assigns, may apply by notice at the foot hereof, to vacate, modify or extend the foregoing injunction because of any change of circumstances since the entry hereof, or for any additional relief to which he or it may deem himself or itself entitled by reason of any acts or events occurring after the date of this decree.

X. Nothing contained herein shall be construed to limit, prejudice, or restrict the exercise of the jurisdiction and power of the Public Service Commission of the state of New York under Chap. 480 of the Laws of 1910, as amended and supplemented, known as the Public Service Commission Law, or any other provisions of law, not inconsistent with the provisions of this decree.

XI. The plaintiff shall recover its taxable costs and disbursements of the defendants, including the sum fixed and allowed as the compensation of the Special Master herein and his necessary disbursements, to be equally borne and paid by the defendants, in accordance with the rules of the Supreme Court of the United States on this subject.

P.U.R.1928E.

MONTANA PUBLIC SERVICE COMMISSION.**RE GREAT FALLS GAS COMPANY.**

[Docket No. 1013, Report & Order No. 1523.]

Constitutional law — Due process — Notice of hearing.

1. The requirements of due process of law are complied with, in the absence of statutory directions, when actual written notice of a Commission hearing is given to the interested party, p. 810.

Procedure — Waiver of notice of hearing.

2. All objections as to the adequacy of legal notice of a Commission hearing are effectively waived by a utility by the appearance of counsel requesting a continuance, p. 810.

Pleadings — Adequacy of complaint — Rate proceeding.

3. Informal complaints although not couched in precise legal language, but sufficient to apprise the Commission that the complainant regards a utility's rates as unreasonably high, are sufficient to meet the requirements of statute having to do with complaints against utility rates, p. 811.

Rates — Jurisdiction of Commissions — Complaints.

4. A Commission has statutory jurisdiction to investigate the reasonableness of utility rates regardless and apart from any jurisdiction conferred by the filing of complaints or protests, p. 811.

Rates — Schedules — Commission approval.

5. No schedule of rates published by a utility subsequent to the adoption of the Public Service Commission Act becomes a lawful schedule until it has the approval of the Commission, p. 812.

Rates — Commission jurisdiction — Establishment and revision.

6. The establishment of initial rates, although a function of management, does not preclude the subsequent right of the Commission to revise or restrain such rates after proper investigation, p. 812.

Public utilities — Wholesale gas supply company.

7. Whether or not a pipe line company supplying wholesale gas to a distributing public service corporation is a public utility, cannot be made an issue in rate proceedings of the distributing utility, and its status can only be determined in a proper proceeding, p. 817.

Return — Risks of enterprise — Comparative experience.

8. In establishing initial rates for a new territory to serve a city which compares favorably from an anticipated business viewpoint with another city in the same state and located under similar conditions, a utility cannot reasonably ignore the experience of the second city in the establishment and growth of such utility business, especially when the attitude of utility experts indicates that the company in actual construction has taken into account such experience, p. 822.

Valuation — Useful property — Alternative gas supply plant.

9. A utility establishing a natural gas business involving an invest-
P.U.R.1928E.

ment reputed to amount to over two million dollars was presumed to have investigated the source of natural gas to the extent of a practical assurance that the supply would be available for a sufficient time to warrant such investment, and accordingly an artificial gas plant was not permitted to be included in the valuation of useful property as an alternative source of supply, p. 827.

Valuation — Unusual obsolescence.

10. When unexhausted property has been rendered useless by a sudden discovery or industrial improvement, the utility should be permitted to treat the superseded property as unusual obsolescence to be amortized out of earnings, or the value of the patent, new process, or contract should be determined and capitalized as a part of the rate basis, p. 828.

Valuation — Bond discount.

11. Inclusion of bond discount in the estimated rate base of a public service corporation is erroneous, p. 829.

Depreciation — Necessity for fund — Inadequate earnings.

12. The inability of a utility to earn a fair rate of return and at the same time take care of depreciation does not constitute an argument excusing failure to set aside such fund, p. 829.

Depreciation — Measure of accrued depreciation — Natural gas.

13. An amount of 2 per cent of depreciable value of a natural gas utility property fixed as a depreciation annuity in a previous decision, was taken as a measurement for accrued depreciation during the period elapsed since that decision, p. 829.

Valuation — Working capital — Relation to expense — Natural gas.

14. A sum equal to one-twelfth of the estimated annual operating expenses of a natural gas utility was tentatively accepted to represent an allowance for working capital pending further experience of the company, p. 831.

Valuation — Cost of financing — Natural gas.

15. A proposed allowance of 10 per cent of the value of a natural gas utility property for cost of financing was eliminated from the rate base as an improper item, p. 831.

Valuation — Overhead allowance as including going value.

16. No additional or specific sum need be allowed for going concern value where the utility property has been valued on the basis of reproduction cost new less depreciation and the items of organization and other pioneer expenses have been included in a general allowance for overhead construction cost, p. 835.

Return — Operating expenses — Natural gas pipe line loss.

17. It was believed that any estimate of operating expenses by a natural gas utility to place its distribution line loss at a percentage in excess of 12½ per cent was unreasonable, p. 839.

Return — Operating expenses — Supply contract — Collateral attack.

18. The Commission in a rate proceeding of a distributing natural gas public utility is bound to proceed upon the assumption that the P.U.R.1928E.

rates charged to a utility by a pipe line company, according to the terms of the supply contract, are not unreasonable, leaving such question for determination upon a proper proceeding, p. 841.

Return — Operating expenses — Distribution cost exclusive of taxes — Natural gas.

19. A proposed distribution cost of a natural gas utility of \$0.06885 per thousand cubic feet was held to be unreasonable where the experience of another utility operating in a neighboring city within the same state but under more unfavorable field conditions, showed an average cost of \$0.0532 for the preceding five years; and a figure of \$0.055 was held to be a reasonable amount under such circumstances for that expense, p. 841.

Commissions — Power to relieve from gross receipts tax.

20. The state, armed with police power and acting through a designated agency invested with the exclusive control, supervision, and regulation of public utilities, in the exercise of such powers, may strike down a so-called gross receipts tax provision of a municipal ordinance, the effect of which is to devote the revenues of a utility to the advantage of taxpayers, and discriminating to that extent against the rate payers, p. 842.

Franchises — Gross receipts tax provision — Relief by Commission.

21. A natural gas utility was, by Commission order, relieved of the burden imposed by a franchise requiring the payment of a gross receipts tax which operated to the unjust advantage of the taxpayers as against the utility's rate payers, p. 842.

Depreciation — Annual allowance — Natural gas.

22. An allowance of 8 per cent of the physical depreciable property of a natural gas utility was made for annual depreciation, p. 847.

Return — Operating expenses — Federal income tax.

23. The proper method of including Federal income tax in the operating expenses of a utility is to include first the total tax in expenses and then deduct the amount of the resulting exemption from the fair return otherwise allowed, p. 848.

Return — Percentage allowed — Natural gas.

24. An allowance of 8 per cent was made for annual return to a natural gas utility, less a proper sum to compensate the inclusion of Federal income tax as an operating expense, p. 851.

Service — Gas — Boyle's Law.

Discussion of the application of Boyle's or Mariotte's Law to the commercial standards of gas distribution, p. 814.

(YOUNG, Commissioner, dissents.)

[October 25, 1928.]

En banc. INVESTIGATION by the Commission into the reasonableness of initial rates established by a natural gas utility; rates reduced.

Appearances: E. G. Toomey, Counsel, Helena, I. W. Church, P.U.R.1928E.

Attorney, Great Falls, E. R. Foster, Consulting Engineer of the William A. Baehr Organization, Chicago, for the Great Falls Gas Company; J. W. Freeman, Attorney, Great Falls, for the Great Falls Chamber of Commerce; H. S. Greene, Attorney, representing W. M. Cockrill, City Attorney, Great Falls, for the City of Great Falls; E. K. Cheadle, Jr., Shelby, Attorney for Joseph C. Jordan, Great Falls; Francis A. Silver, Counsel, and Fred E. Buck, Chief Engineer, for the Commission.

By the Commission: On November 23, 1927, the Great Falls Gas Company (hereinafter called Utility), a public utility then engaged in the distribution of artificial gas in Great Falls, Montana, filed with the Commission its "Tariff No. 1 (initial rate)," for natural gas service. The tariff was filed in anticipation of the completion of a pipe line to Great Falls from the gas fields situated north of Shelby, Toole county, Montana, which was then in course of construction by the Hope Engineering & Supply Company. The tariff stated rates available for "all purposes for all metered customers located adjacent to company's mains in the city of Great Falls, Montana, and vicinity," as follows:

	Net per 100 cu. ft.
First 5,000 cu. ft. used per meter per month	7½¢
Next 95,000 " " " " " "	5½¢
Next 400,000 " " " " " "	4¢
Next 500,000 " " " " " "	3½¢
Over 1,000,000 " " " " " "	3¼¢

Prompt payment discount: None.

Minimum bill: \$2 per meter per month, or fraction thereof.

Special terms and conditions: If bills are not paid on or before the tenth day after date of rendering, an additional charge of $\frac{1}{2}$ cent per 100 cubic feet of gas used shall be added.

Within a week after the filing of the tariff the Commission received written protests against the approval of the same from Harry B. Mitchell, mayor of Great Falls, acting upon behalf of the city of Great Falls, the Great Falls Mill and Smeltermen's Union No. 16, H. Norskog, an attorney at law, of Great Falls, acting upon his own behalf and on behalf of other residents of Great Falls. An oral protest was also made by the Great Falls chamber of commerce. Under date of December 2, 1927, copies of the written protests mentioned were furnished to the utility,
P.U.R.1928E.

which acknowledged receipt thereof under date of December 5, 1927. On December 10, 1927 the Cascade Trades and Labor Assembly, a society representative of the labor organizations of Great Falls, entered its written protest upon behalf of small consumers.

Before any preliminary investigation into the reasonableness of the proposed rates was made and before any formal inquiry was instituted, the full Commission met informally with representatives of the Utility, the municipality of Great Falls, and the Great Falls chamber of commerce, with the purpose in mind of bringing the parties into agreement upon an initial rate for a trial period. This conference was followed by others in which the Commission did not participate. As a result of the conferences, the Utility, on March 21, 1928, substituted for its original "Tariff No. 1" a new tariff "Tariff No. 1 (Initial Rate)," which reduced the minimum bill from \$2 per meter per month to \$1.50 per meter per month. In all other respects the substituted tariff is the same as the original tariff. The concession made by the Utility did not satisfy the protestants, so the Commission, responsive to the protests above mentioned and to the specific written request of the Great Falls chamber of commerce, made under date of April 11, 1928, that an investigation be made into the rate schedule before concurring therein, made an order on April 19, 1928, directing the Utility to appear before the Commission at Great Falls, Montana, on May 2, 1928, and offer testimony in support of the rates and charges proposed in the substitute Tariff No. 1. Notice of the hearing was regularly served by mail upon the Great Falls Gas Company at its office in Great Falls, Montana, and upon its attorney in Helena, Montana. Notice of hearing was likewise sent to all protestants of record.

Objections to Jurisdiction and Notice of Hearing

We have recited at considerable length the preliminary history of this proceeding because of the objections lodged by the Utility at the opening of the public hearing at Great Falls on May 2, 1928. When the hearing was called and the notice of hearing read by the Commission's secretary, the Utility, through its coun-

P.U.R.1928E.

sel, entered the following six objections, which we quote from the record:

"First—that no notice thereof was legally served upon the corporation;

"Second—that no notice thereof was served upon the corporation within the time fixed by the laws of the state of Montana;

"Third—that the alleged notice mailed to the corporation unlawfully fixed the time for the hearing at such a time that was not sufficiently advanced to meet the requirements of the Public Service Commission Act;

"Fourth—that the alleged notice which was attempted to be served on the corporation, giving one half the statutory time for appearance in answer to the summons, fixed an unreasonably short time for the appearance of the delivering corporation;

Fifth—all circumstances considered, the corporation was compelled to proceed without due process of law; and

Sixth—that such requirement violates Article 3 of the Constitution of the state of Montana and the 14th Amendment to the Federal Constitution."

After counsel for the chamber of commerce had read into the record a prepared statement of the chamber's position, the Utility, upon being requested to proceed to adduce evidence in support of its proposed schedule, offered the following thirteen objections to this proceeding:

First—that no complaint against the existing natural gas rates has ever been filed with the Commission herein;

Second—that no complaint against the proposed natural gas rates was ever filed with the Commission herein;

Third—that the Commission is not and never has been, by any complaint or otherwise, invested with jurisdiction to hear this controversy;

Fourth—that no prospective consumer of natural gas has ever made or filed a complaint against Tariff No. 1, naming natural gas rates for the Great Falls Gas Company;

Fifth—that no consumer of natural gas has ever made or filed a complaint against Tariff No. 1, naming natural gas rates for the Great Falls Gas Company;

Sixth—that since the consumption of natural gas did not

commence until May 2, 1928—this morning—the effect of said rates is of fact unknown to any consumer of said gas and a complaint by any such consumer has been and is not for that reason possible;

Seventh—that the Commission has never been furnished with any pertinent or reliable information or data antagonistic to Tariff No. 1, naming natural gas rates for the Great Falls Gas Company, by any person or from any source other than the company and that on representations of any character to the Commission cannot be made a basis for legal complaint;

Eighth—that the initiation of these rates is entirely a function of the management, which cannot be fixed or exercised by the Commission;

Ninth—that the performance of a legal duty separately attends the filing of rates by the Great Falls Gas Company and the same cannot be overcome by evidence furnished by a trial period;

Tenth—that Tariff No. 1, naming natural gas rates for the Great Falls Gas Company, was filed with the Commission more than thirty days ago and has never been, by any person, corporation or organization, complained against or by the Commission disapproved and the same became automatically effective on May 2, 1928, upon the commencement of natural gas service in Great Falls, under the provision of § II of the Public Service Commission Act;

Eleventh—that the Commission has no jurisdiction to suspend initial rates for any period and it has never claimed or attempted to exercise such jurisdiction;

Twelfth—that the Commission has no jurisdiction in a contested rate proceeding to prescribe a rate without finding and stating the fair present value of the property involved;

Thirteenth—that, in view of the fact that the first natural gas service in the history of Great Falls commenced this morning, May 2, 1928, and the only known or knowable elements entering into the making of these initial rates are such as have been or will be furnished by the management to the Commission and such elements completely justify the rates proposed until a reasonable trial has been had.

All objections were overruled *pro forma*, to be given considera-
P.U.R.1928E.

tion on their merits upon a final disposition of this proceeding. We, therefore, undertake to dispose of the objections before passing to a consideration of the testimony and exhibits introduced at the hearing.

[1, 2] The Public Service Commission Act (Chap. 52, Laws of 1913), does not prescribe the manner in which a notice of hearing must be served upon a public utility. In the absence of statutory directions, we are of the opinion that the requirements of due process of law are complied with when actual written notice is given. There is no contention made herein that actual notice was not received by the Utility. On the contrary, the files disclose that on April 19, 1928, notice of hearing was sent by mail to the Utility at its principal place of business in Montana, namely, Great Falls, and to its attorney at Helena, Montana, and that on April 21, 1928, eleven days before the date set for the hearing, the attorney for the Utility wrote the Commission acknowledging receipt of the notice of hearing and requesting a continuance thereof. Even though we were to concede—which we emphatically do not—that legal notice was not served upon the utility, all objections on this score were effectively waived when the utility, by counsel, requested a continuance. That request constituted a general appearance and a submission by the utility to the jurisdiction of the Commission (McCormick Harvesting Mach. Co. v. Scott (Neb.) 89 N. W. 410; Wagner v. Kellogg, 92 Mich. 616, 52 N. W. 1017; Epps v. Sasby, 43 Ark. 545; Murat v. Hutchinson, 16 N. J. L. 46, and see 4 Corpus Juris 1333, et seq.).

The Utility was entitled to ten days' notice of the time and place of hearing (§ 3897 R. C. M. 1921), and, therefore, its objection on this score is without merit. The other objections to the notice are predicated upon alleged lack of legal and timely notice and the Commission having determined that actual notice was seasonably given (as well as waived) all objections to the notice must be and are overruled.

The objections interposed to our jurisdiction to proceed must likewise be overruled. Section 3897 of the Revised Codes of Montana, 1921, provides, in part, as follows:

"Upon a complaint made against any public utility by any
P.U.R.1928E.

mercantile, agricultural, or manufacturing society or club, or by any body politic or municipal organization, or association or associations, the same being interested, or by any person or persons, firm or firms, corporation or corporations, provided such persons, firms, or corporations are directly affected thereby that any of the rates, tolls, charges, or schedules, or any joint rate or rates, are in any way unreasonable or unjustly discriminatory, or that any regulations, measurements, practices, or acts whatsoever affecting or relating to the production, transmission, or delivery or furnishing of heat, light, water, or power, or any service in connection therewith, or the conveyance of any telegraph or telephone message, or any service in connection therewith, is in any respect unreasonable, insufficient, or unjustly discriminatory, or that any service is inadequate, the Commission shall proceed, with or without notice, to make such investigation as it may deem necessary. But no order affecting such rates, tolls, charges, schedules, regulations, measurements, practice, or act complained of shall be entered without a formal hearing."

[3] The municipality of Great Falls, a prospective consumer of natural gas, the labor organizations above mentioned, whose members were prospective users of natural gas were all "interested" parties within the meaning of the statute and Mr. Norskog, an individual prospective consumer, was as such prospective consumer "directly affected" by the rates for natural gas stated in Tariff No. 1, and thereby eligible to file a complaint before the Commission. While it is true that all of the complaints or protests were informal, in that they did not charge in precise legal terminology that the proposed rates were unreasonable, they were nevertheless sufficient to apprise the Commission and the utility that it was complainants' respective contentions that the rates proposed for natural gas were unreasonably high. In our opinion they separately meet the requirements of the statute.

[4] But apart from the jurisdiction conferred upon the Commission by the filing of the above mentioned complaints or protests (all of which were duly served upon the Utility in December, 1927), it is clear to us that we have the right upon our own motion to inquire into the reasonableness of a schedule of P.U.R.1928E.

rates filed with the Commission for its approval. Section 3899, R. C. M. 1921, provides, in part, as follows:

"The Commission may at any time, upon its own motion, investigate any of the rates, tolls, charges, rules, regulations, practices, and service (and) after a full hearing, as above provided, by order make such changes as may be just and reasonable, the same as if a formal complaint had been made."

[5, 6] Full hearing, "as above provided," refers to the requirements of § 3897 to the effect that "the Commission shall give the public utility at least ten days' notice of the time when and the place where such hearing will be held, at which hearing both the complainant and the public utility shall have the right to appear by counsel, or otherwise, and be fully heard." But even were we without such an express provision as is above quoted, it would appear to us that the right to concur or to refuse to concur in a set of rates necessarily involved the implied right to investigate to determine whether or not it would be proper to concur. Despite the assertion to the contrary, no schedule of rates published by a utility subsequent to the adoption of the Public Service Commission Act becomes a lawful schedule until it has the approval of the Commission (§ 3891 R. C. M. 1921, State ex rel. Billings v. Billings Gas Co. 55 Mont. 102, P.U.R.1918F, 768, 173 Pac. 799). It is just as important to the consuming public that an initial schedule of rates be reasonable as it is that subsequent rates be not unreasonable. With respect to reasonableness, the only difference that we see between an initial rate and a subsequent one is that it is more difficult to prove the unreasonableness or reasonableness of the former due to the lack of exact information concerning factors that enter into a rate set-up. Recognizing, as we do, that the initiation of initial rates is a function of management, does not involve the admission that this function is to be exercised without limitation or restraint. The Utility directs our attention to our decision in Benjamin v. Great Northern Utilities Co. 17 M. U. R. 487, P.U.R.1924B, 705, 708, where, regarding this subject, we said:

"Following submission of the proposal and after preliminary investigation, the Commission approved the rates for a trial period. In this instance, as in all others where the statement P.U.R.1928E.

of a rate is a pure prediction because of the utter absence of an empirical standard, the Commission has followed the practice of relying, to a large extent, upon the judgment of those who are responsible for the enterprise. They are possessed of the known factors that may be utilized in formulating a schedule of rates, and are better qualified than the Commission, at that stage of the business to deal with the necessities of the situation. We do not mean to convey the impression that there is no check on the initial proposal for rates. The contrary is the fact, and the Commission makes the best preliminary determination that it can, but the Commission, under the American system of regulation, may never rightfully assume managerial functions. Its experience to date has confirmed its confidence in the honesty and fairness of private management in the matter of stating trial rates for a new public service; and it has generally been found that the anxiety to develop the business restrains, in limine, the proposal of high rates."

There is nothing in the views expressed in the Benjamin case, *supra*, that militates against the present proceeding. On the contrary, our experience in that case more than justifies our present course of procedure. The report in the Benjamin case, *supra*, shows that within ten months after we approved initial rates suggested by the Great Northern Utilities Company, we found it proper to substantially revise downward its initial schedule, a cut of approximately forty per cent being made in the first step of 5,000 cubic feet, and material reductions ordered in all steps up to 150,000 cubic feet. The glaring errors committed by the management in that case in constructing initial rates convinced us that in view of the complaints and protests on file herein the proper method of inquiry in this matter would be by formal investigation and public hearing where complainants and others directly interested could offer such pertinent evidence as they deemed fit on the issue of the reasonableness of the proposed rates and where the Utility could make a public justification of its rate schedule and rebut any evidence adverse thereto.

Contract for Gas Supply

On May 2, 1928, the Utility commenced furnishing natural
P.U.R.1928E.

gas to consumers at Great Falls. It secures its supply of natural gas from the Montana Cities Gas Company, a corporation (hereinafter called Pipe Line Company), taking delivery thereof at the city gates. Under the contract existing between the Utility and the Pipe Line Company, the latter makes delivery of the gas at the outlet side of its regulators at a normal gauge pressure of fifty pounds, subject to an absolute minimum gauge pressure of 25 pounds. The Utility pays for the gas at the rate of 27 cents per thousand cubic feet when corrected to a pressure base of 8 ounces above an assumed atmospheric pressure of 14.4 pounds and at an assumed temperature of 60 degrees Fahrenheit. Gas is retailed to consumers on a pressure base of four ounces above atmospheric pressure at prevailing temperature.

The use of one standard as a basis for measurement of gas in the case of purchase and the employment of another standard in the case of resale to consumers gave rise to a conflict in the testimony at the public hearing between the Utility's engineer and the city engineer of Great Falls. This conflict, however, is easily reconcilable when the law of gases (Boyle's or Mariotte's so called) is applied to the statement of facts with all pressures expressed in absolute units. Boyle's or Mariotte's law states that the volume of any definite weight of gas at constant temperature decreases proportionately as the absolute pressure and increases proportionately as the absolute pressure decreases. For example, if the pressure on the volume of a given weight of gas is reduced from 20 pounds per square inch absolute to 10 pounds per square inch absolute, without any change of temperature, the volume will be doubled, or if, on the other hand, the pressure on the volume of a given weight of gas is increased from 10 pounds per square inch absolute to 20 pounds per square inch absolute, without any change of temperature, the volume will be reduced one half. Absolute pressure, or pressure absolute, is defined as the total pressure acting upon a surface, and to express gauge pressure above atmospheric pressure in absolute units it is necessary to add the atmospheric pressure to the gauge pressure. Therefore, in this case, to express the standards of measurement of gas used in the purchased and resale, respectively, in absolute units, it must be stated that the Utility is buying
P.U.R.1928E.

gas on a pressure base of 14.4 pounds (assumed atmospheric pressure) plus 0.5 pound (8 ounces), or 14.9 pounds absolute pressure, and is selling gas on a pressure base of 13.03 pounds (atmospheric pressure estimated to obtain at Great Falls by taking the mean between Helena, Montana, and Havre, Montana, where barometric readings are daily recorded by the United States Weather Bureau), plus 0.25 pound (4 ounces), or 13.28 pounds absolute pressure. To convert the actual quantity of gas measured at any pressure into the quantity in cubic feet that would be registered by a meter measuring the same weight of gas at a pressure which is adopted as the standard or base pressure, it is only necessary to apply Boyle's or Mariotte's law. The following formula, taken from Diehl's "Natural Gas Handbook," 1927 Edition, p. 70, exhibits the process:

$$Q = q \frac{A + p}{Pb} \text{ in which}$$

Q =quantity in cubic feet at standard pressure or base pressure.

q =cubic feet registered by meter.

A =atmospheric pressure in pounds.

p =gauge pressure at point of measurement expressed in pounds per square inch.

Pb =standard or base pressure in pounds per square inch absolute.

Let us assume, by way of example, that the Utility purchases 1,000 cubic feet of gas from the Pipe Line Company at a gauge pressure of 50 pounds. To determine the quantity of gas that the Utility will have to pay for on the contract pressure base of 8 ounces over an assumed atmospheric pressure of 14.4 pounds Q , the quantity in cubic feet at contract base pressure for which the utility will have to pay at the rate of 27 cents per cubic foot, equals q , the amount measured through the meter at 50 pounds gauge pressure, multiplied by A , assumed atmospheric pressure of 14.4 pounds, plus gauge pressure, 50 pounds, divided by Pb , the base pressure in pounds per square inch absolute i. e., 8 ounces over 14.4 assumed atmospheric pressure, or, stated in accordance with the formula:

$$Q = 1,000 \frac{14.4 + 50}{14.4 + .5} = 4,322.147 \text{ cubic feet}$$

Again, let us assume that the Utility takes 1,000 cubic feet of gas measured through a meter at the contract pressure base P.U.R.1928E.

(8 ounces over 14.4 pounds) and reduces its pressure so as to pass it through a consumer's meter at a gauge pressure of four ounces over 13.03, estimated prevailing atmospheric pressure at Great Falls, then according to the formula the consumer's meter will register 1122 cubic feet, approximately. To state it in formula form:

$$Q = 1,000 \frac{14.4 + .5}{13.03 + .25} = 1,121.987 \text{ cubic feet}$$

When gas is measured at high pressure and the measurement is expressed at a base pressure, the assumption is indulged in that natural gas conforms to the laws of perfect gases. But, while it is true that all gases conform closely to Boyle's or Mariotte's law, it has been found by experience that various volumes of natural gas at high pressures will occupy slightly greater volume at base pressure than would be obtained by using the above formula. The deviation for various gases varies with the composition of the gas. Nevertheless, it appears to be the common practice in the gas industry to use a table of base pressure multipliers, evolved from the above formula, for the purpose of converting readings obtained from displacement meters at various pressures into quantities at a standard or base pressure (see Diehl, *supra*, pps. 72-74 and 201, et seq.).

By reason of the fact that a difference of atmospheric pressure produces a considerable effect upon the basis of measurement of upon the value of the coefficients used when different interpretations are placed upon the term "atmospheric pressure," it has become the general practice to adopt as a standard basis for the measurement of natural gas an assumed atmospheric pressure of 14.4 pounds (that being the atmospheric pressure prevailing in most of the gas fields of the United States) and an assumed temperature of 60 degrees Fahrenheit. The United States Bureau of Mines has issued instructions in connection with the standard to be employed in measuring gas in which the United States has a royalty or other interest as follows:

"The standard pressure in all measurements of gas sold or subject to royalty shall be 10 ounces above an atmospheric pressure of 14.4 pounds per square inch regardless of the atmospheric pressure at the point of measurement, and the standard of temp.
P.U.R.1928E.

perature shall be 60 degrees Fahrenheit and all measurement of gas shall be reduced by computation to these standards no matter what may have been the pressure and temperature at which gas was actually measured." (See Diehl, *supra*, 207).

Thus, it appears that the utility's contract in this case conforms to the general practice. However, as will hereinafter appear, the Utility in computing the amount of gas it will have to purchase from the Pipe Line Company on a pressure base of 8 ounces over assumed atmospheric pressure of 14.4 pounds in order to enable it to deliver an estimated quantity to its consumers at Great Falls on a pressure base of four ounces over actual atmospheric pressure and to take care of line losses, has recognized the operation of Boyle's or Mariotte's law and has taken into account the fact that it buys gas on an assumed atmospheric pressure higher than the actual atmospheric pressure prevailing at Great Falls.

Source of Supply

Natural gas is piped to Great Falls from the Kevin-Sunburst field by means of a 12-inch main line extending from Telstad to the city gate, a distance of approximately eighty miles, and branch lines of smaller bore extending from Telstad into the producing areas. At the date of hearing the total mileage of branch lines was estimated at 30 miles. The producing wells that furnish the Great Falls supply are not owned or operated by the Pipe Line Company but their output is controlled under long-term contracts. The original contracts for a gas supply in the Kevin-Sunburst field were all negotiated by the Hope Engineering and Supply Company, the company which, as owner, built the pipe lines. Likewise, the original contract for supplying the utility with natural gas for its consumers at Great Falls was an engagement of the Hope Company. The Montana Cities Gas Company has succeeded to all the rights and liabilities of the Hope Company in and to the various contracts and is now the owner of the pipe line.

Relationship Between Utility and Wholesaler

[7] Both the Utility and the Pipe Line Company assert that
P.U.R.1928E. 52

there exists no relationship between the companies except that of seller and purchaser of natural gas and so far as this record is concerned their assertions must be accepted as correct. While it appears from the transcript that the Pipe Line Company is engaged in selling natural gas to the Anaconda Copper Mining Company for use in its reduction works and wire mill at Black Eagle, near Great Falls, as well as to the utility, it maintains that it is not a public utility subject to our jurisdiction. Whether or not the Pipe Line Company is a public utility is not an issue in this proceeding; its status can only be determined in a proper proceeding (See Gallatin Nat. Gas Co. v. Public Service Commission, 79 Mont. 269, 256 Pac. 373).

Initial Rates

The establishment of just and reasonable rates for natural gas or any other commodity furnished by a public utility is controlled largely by three factors: (a) the value of the property, used and useful, devoted to the public service; (b) the cost of operation and (c) the quantity of the product sold. The last factor necessarily involves the number of consumers. Where a Utility is fully established these factors are fairly constant and under the rule that a public utility is entitled to earn a fair return upon the fair value of its property, used and useful for the convenience of the public, it is not a matter of great difficulty to determine what is a fair and just rate, but where, as here, the Utility is embarked upon a new enterprise—new in the sense that it is now furnishing natural gas whereas it previously manufactured and sold artificial gas—the essential factors in their fullness are not known but must necessarily be estimated. The question, therefore, as we view it, in the determination of whether the initial rates proposed by the Utility for natural gas are just and reasonable depend upon whether the estimates upon which the initial rates are predicated are reasonable estimates—assumptions that are fairly justified by the known facts and probabilities of the situation.

The Utility's Rate Study

To sustain the schedule of initial rates proposed to the Com-
P.U.R.1928E

mission, the Utility produces the witness Foster, an engineer in the employ of the William A. Baehr Organization, a firm of consulting engineers who work in conjunction with the North Continent Utilities Corporation, a company engaged in the operation of a group of public utilities, among which is the Great Falls Gas Company. Foster testified that the rates under inquiry were constructed by him after a careful study of the natural gas situation in Great Falls. A rate study, prepared by the witness, was introduced in evidence to show the manner in which the proposed rates were constructed. The study is segregated by the witness into three parts: first, a statement showing the results which have been obtained by the Utility since the Commission's decision in Re Great Falls Gas Rates, decided May 9, 1922, 15 M. U. R. 379, P.U.R.1922D, 385, based upon the findings of the Commission in that case; second, an estimate of conditions as the witness believes they will be for several years in the future after the natural gas business of the Utility has been built up and an application of the proposed rates to such estimated conditions; and third, the details which have been used to analyze the situation and build up the proposed rate.

Stated briefly, Foster, in constructing the initial rate schedule, proceeded upon the assumption that after the Utility has attached all the business that it can reasonably be expected to attach after a diligent campaign, it will have 6,000 natural gas customers consuming 1,103,992,000 cubic feet of natural gas per annum. From these consumers he estimates the Utility will derive, under the proposed rates, revenue in the amount of \$571,434. At that estimated time the witness places the value of the utility's property, used and useful for the convenience of the public, at \$1,471,648, and estimates its operating expenses at \$419,715, leaving a net before depreciation of \$151,719. Depreciation in the utility's property is computed as of this estimated time at \$76,822, arrived at by applying a depreciation factor of 2 per cent to the value of its plant, excluding land, and a depreciation factor of 8 per cent to the value of all other physical property, excluding land. This would leave available for return the sum of \$68,897, which in percentages figures 4.68 per cent of the value of its estimated property, physical and intangible.
P.U.R.1928E.

Annual Consumption and Number of Consumers

Foster's assumption that the Great Falls territory within the next few years will only afford 6,000 natural gas consumers of all classes with an annual consumption of approximately 1,100,000,000 cubic feet is vigorously challenged by the Great Falls chamber of commerce as an extremely conservative estimate of what the Utility has a right to expect. Inasmuch as the number of consumers and the amount annually consumed influence to a very large extent the amount of the Utility's property investment and operating expenses as well as determines the amount of its revenues, we give this estimate our first consideration.

The territory which the Utility serves with natural gas embraces the city of Great Falls, county seat of Cascade county and principal city of northern Montana, and Black Eagle, a suburb located across the Missouri river adjacent to the reduction plant and copper wire mill of the Anaconda Copper Mining Company. The present population of the region is estimated at 35,000 inhabitants. Within the past few years great strides have been made in building up the population. The Utility serving Great Falls and Black Eagle with electrical energy reports to the Commission the installation of over 1,000 new meters within the past twenty-four months, bringing their total installations to approximately seven thousand, or one consumer for every five residents. Present indications are that the community will continue to grow in population at an even greater rate. A tremendous building program is now under way that will result in the addition of many substantial industrial, residential, and business structures. Great Falls boasts of seven principal industries with an annual pay roll of \$7,500,000 and a total of 74 minor industries employing from two to twenty-five men each. It has 35 miles of street and alley pavements, 20 miles of boulevards, 25 miles of street railway, 725 acres of parks and playgrounds, a half million dollar municipally owned water system, a public natatorium, a public market, and is at present engaged in erecting a new million dollar high school (See "Montana" published by the Department of Agriculture, Labor and Industry of the State of Montana, Vol. 3, No. 2, pps. 269 to 271). Exhibit 10, introduced by the P.U.R.1928E.

chamber of commerce at the hearing, gives a numerical summary of dwellings, hotels, businesses, etc., in Great Falls as of May 3, 1928. From the exhibit it appears that Great Falls had of said date 4,158 dwellings, 323 duplex houses, 179 apartment houses and flats, 36 boarding and rooming houses, 69 hotels and rooming houses, 99 grocery stores, 42 cafes and public dining rooms, 37 soda fountains, 42 auto agencies, 30 tobacco stores and pool halls, 18 drug stores, 17 clothing stores, 13 tailor shops, 18 office buildings, 18 schools, 14 shoe repair shops, 18 paint shops, 28 barber and beauty shops, 14 butcher shops, 12 bakeries, 24 churches, 5 hospitals, 4 banks, 5 commission houses, 3 creameries, 2 bottling works, 6 printing offices, 11 wholesale machinery shops, 6 printing shops, 11 coal depots, 5 lumber yards, 6 plumbing establishments, 4 railway depots and warehouses, 8 dry cleaning establishments, 7 electrical supply stores, 7 manufacturing confectioneries, 8 hardware stores, 8 jewelry stores, 7 millinery establishments, 4 music stores, 3 laundries, 4 theaters, 5 house furnishing stores, 4 sheet metal works, 2 iron foundries, 5 blacksmith shops, 7 photographers, 2 taxidermists, 2 machine shops, 2 upholsterers, 2 funeral directors, 5 shoe shining parlors, 1 telephone office, Federal building, courthouse, public library and city hall. Topographically, Great Falls is quite level. Due to the foresight of its founders it is laid out on a preconceived plan; its streets are of the same width and the blocks are uniform. To quote the witness Foster, "it is one of the neatest cities to work on." Thus, we have a brief picture of the field in which the Utility will operate, & sketch of one of the most progressive cities in the United States—a city that possesses perhaps the brightest future of any city in the state and a community that has been uniformly rated high by public utility interests who have had occasion to make surveys of its potentialities.

In estimating the number of natural gas consumers to be expected ultimately, that is, after several years of operation, it is customary for natural gas utility promoters to assume one consumer for each five people in the territory to be served (See "Salient Features of Gas Distribution," an article by T. H. Kerr in the special natural gas edition of the Oil and Gas Journal for June 16, 1927). Montana cities that have enjoyed natural
P.U.R.1928E.

gas service for a period long enough to permit the Utility to have reached the established stage testify to the accuracy of this assumption in Montana at least. The Great Northern Utilities Company (owned by the same corporation that owns the Great Falls Gas Company), supplies natural gas to Shelby, the county seat of Toole county, Montana, situated about one hundred and ten miles north of Great Falls. It has a population estimated between 2,000 and 2,500 people. On December 31, 1927, less than five years after it began operations, the Great Northern Utilities Company reported to the Commission that it had 485 customers. The Billings Gas Company, which furnishes natural gas to the city of Billings and the nearby towns of Laurel, Fromberg, Bridger, Silesia, and Edgar, with a combined population estimated by the utility at 25,000, had, on December 31, 1927, less than six years after it commenced selling natural gas, a total of 4,830 consumers. Havre, which secured its first dependable and unlimited supply of natural gas in October, 1926 (See Re Havre Nat. Gas Co. 20 M. U. R. —, P.U.R.1927D, 811), is, according to the testimony of one of the utility's officers, rapidly approaching a one to five basis. Baker, in the extreme eastern portion of the state, exceeds the average with about one customer to every three inhabitants but its above-the-average showing is doubtless due to the fact that the gas deposits underlie the town. Measured by the accepted basis for reckoning and the experience of Montana natural gas cities, Foster's estimate represents an extremely conservative figure but when his estimate is considered in connection with actual conditions existing at Great Falls, it passes from the class of conservative estimates to the category of unreasonable assumptions.

[8] The Utility commenced its natural gas operations with over 4,100 consumers, that being the approximate number of artificial gas consumers attached to its mains on May 2, 1928. Foster's estimate, therefore, is that within the next five years—the period over which his rate study is projected—the Utility can only expect, after using due diligence to acquire customers, to increase the number of its patrons a trifle less than fifty per cent. This assumption is clearly out of line with the experience of the Billings Gas Company in changing over from artificial P.U.R.1928E.

gas to natural gas. Natural gas was first turned into the mains at Billings in January, 1922. At that time the Billings Gas Company had 2207 artificial gas consumers. During the year 1922 it added 1726 customers. As of December 31, 1923, it reported 4011 consumers; December 31, 1924, 4,285 customers; December 31, 1925, 4351 customers, and as December 31, 1926, at the end of practically five years' operations, it reported 4,540 consumers, or an increase 1926 over January 1922, of over 105 per cent. As above adverted to, it had 4,830 consumers on the last day of the year 1927. While it is not possible to affirm that Great Falls Gas Company will undergo the same experience as the Billings utility, it does not accord with reason to so materially discount the Billings experience as the Utility has here done. Billings is a type of city that compares favorably with Great Falls, from a public utility standpoint. Like Great Falls, it is a modern city, has fine types of residences, business blocks, and public buildings. Its citizenship is of the same progressive and aggressive type. Given a natural gas rate that is reasonable, Great Falls possesses all the essentials to substantially duplicate, if not better, the Billings record.

In estimating the annual consumption at 1,103,992,000 cubic feet for 6,000 customers, the rate study thereby fixes the estimated average per customer consumption at 184,000 cubic feet per annum. This assumption is flatly contradictory of the results obtained by established natural gas utilities in Montana. The natural gas utility at Shelby, which in rate and valuation matters is under Foster's jurisdiction, reports to the Commission consumers and consumption from the first year of its existence up to and including 1927, as follows:

Year.	Total customers as of December 31st.	Total gas sales in cubic feet.	Average number of cubic feet per consumer.
1923	209	38,814,700	185.716
1924	310	72,233,300	233.011
1925	375	93,246,300	248.657
1926	463	102,540,200	221.470
1927	485	129,434,400	266.875

The Billings Gas Company reports show that the average consumption per customer in cubic feet in Billings and the nearby towns served by the utility for the last five years was as follows:
P.U.R.1928E.

1923	237,477
1924	251,490
1925	251,138
1926	222,968
1927	249,307

The Montana-Dakota Power Company, with less than one year's operating data, reported to the Commission that in 1927 its supply to the cities of Glendive, Miles City, and Terry, Montana, and to Marmarth, North Dakota, a total of 287,963,882 cubic feet of natural gas and that it had on December 31, 1927, a total of 966 consumers in the four cities, thus making an average annual consumption per customer of approximately 298,000 cubic feet.

The report of the Chinook Natural Gas Company for 1927, the first full calendar year of its operations, discloses that the average consumption per customer at Chinook was approximately 309,000 cubic feet, while the Utility at Baker, Montana, reports an average slightly in excess of 277,000 cubic feet per consumer for the same period.

The Havre Natural Gas Company, which on February 2, 1927, commenced selling natural gas in Havre to all who applied, showed for the 11-months' operations during 1927 an average per customer consumption of 160,000 cubic feet. In this connection, however, the manager of this Utility testified at the hearing herein that during the first four months of 1928, the Havre Natural Gas Company sold more natural gas than it did during the eleven months in 1927. He reported the number of customers as of the date of the hearing at approximately 850 as against 826 on December 31, 1927. It is evident that the increase in gas sales is attributable to the increase in per customer consumption rather than to the addition of less than twenty-five new customers. This same witness predicted that even though his company did not attach another customer during 1928, it would sell during that year more than 100,000,000 cubic feet of gas over 1927. In view of the actual results obtained by natural gas utilities in Montana, we cannot lend our approval to Foster's estimate. Our own Montana experiences are to be taken as more reliable guide posts in the construction of a rate study than are the experiences of natural gas utilities in other P.U.R.1928E.

sections of the country where local or climatic conditions differ so widely. We do not place any credence in the supposition that Great Falls is less likely to attain a normal natural gas consumption because as a city served with artificial gas its average annual consumption per customer was only 19,000 cubic feet, a figure stated to be under the average. But, even assuming that the artificial gas consumption in Great Falls was lower than that found to prevail in other cities, a fact which is not proven in the record but merely asserted, there are valid reasons justifying such a situation. The Utility's artificial gas tariff provided a rate at \$1.95 per 1,000 cubic feet for the first 10,000 cubic feet; \$1.75 for the next 10,000 cubic feet; \$1.55 for the next 30,000 cubic feet; and \$1.30 per M cubic feet for all over 50,000. Great Falls has, and has had, at its doorstep (Sand Coulee and Stockett), a vast supply of coal affording it comparatively cheap fuel. Artificial gas, at the prices stated, was entirely out of the question for fuel purposes. The lighting rates maintained by the Montana Power Company at Great Falls would not, all factors considered, permit artificial gas to compete with electricity for illuminating purposes. The natural result of such a combination of existing conditions was to limit the field of employment and uses of artificial gas. But, with a rate for natural gas that will, when considered in connection with efficiency, cleanliness, and convenience, compete with coal or other fuel substances, the prediction is in no sense rash that Great Falls will become one of the largest per capita gas consuming cities in the country. Contrasting the actual experience of the Billings Gas Company with the forecast for Great Falls, it will be seen that whereas the Billings Gas Company with 4,830 customers on December 31, 1927, sold during the year 1927, 1,204,154,400 cubic feet of gas, Foster's prediction is that Great Falls, with approximately 1,200 more customers, will annually consume less than the Billings territory by 100,000,000 cubic feet. But, apart from the consideration of results obtained in other Montana cities, there is ample evidence in the record to justify the conclusion that Foster's estimate is excessively low. On December 5, 1927, shortly after Tariff No. 1 covering natural gas rates for Great Falls had been filed with the Commission, the manager
P.U.R.1928E.

of the Utility, Mr. Sikes, in the course of a letter written to the Commission regarding certain complaints that had been made with reference to the proposed initial rate schedule, said: "The line being constructed to Great Falls has three times the capacity of the line to Billings *but, of course, we expect to sell twice as much gas.*" At the public hearing had herein, Sikes was called as a witness and identified the letter in which the above statement occurred. He offered no reason to the Commission why his statement should not stand as representing his honest judgment in the premises nor did he make any attempt to reconcile his estimate with that of Foster's. Making due allowance for the fact that Sikes, in his letter did not fix the time when his expectations would, in his opinion, be realized, the outstanding fact remains that at a time when a controversy was raging respecting the reasonableness of the initial rates for natural gas at Great Falls—a time when interested parties should measure their utterances—Sikes volunteered a statement concerning the vital factor entering into the determination of a reasonable rate for natural gas at Great Falls, which is substantially at 100 per cent variance with the estimate contained in Foster's rate study. Bearing in mind that Foster testified that he had never spent any time in Great Falls for the purpose of making an actual survey of the gas possibilities of the city and that his rate study was compiled and constructed in Chicago upon records in the office of the Baehr Organization and upon information furnished by Sikes from time to time, we are in common sense compelled to give to the estimate of the local manager, presumably familiar with local conditions and potentialities, a much greater weight. Especially is this our obligation when the history of other Montana operations in the natural gas industry tend to support the manager's estimate and when it further appears that a survey of the gas possibilities in Great Falls was made by an expert and that his conclusions support Sikes rather than Foster. We refer to the study of the Great Falls territory from a natural gas view-point made by Frank Fisher, a Michigan engineer, in December, 1925. In making the survey, Mr. Fisher was aided by the Great Falls Gas Company to the extent that the Utility furnished him with a list of the buildings of the territory. It P.U.R.1928E.

was Fisher's judgment at that time that Great Falls offered the possibility of an annual consumption of natural gas in excess of 2,000,000,000 cubic feet. Between the time of his survey and Sikes' estimate of December, 1927, two years elapsed—two years of substantial growth in this territory—so that Fisher's and Sikes' estimates cannot be said to vary materially. In our opinion, any estimate as to the number of consumers of natural gas that can be reasonably expected to be added to the mains of the utility at Great Falls within the next several years below 7,000 consumers, is unreasonably and unduly low, and that any estimate as to the average annual consumption per customer less than 240,000 cubic feet is likewise unreasonable. In other words, it is our judgment that any assumption as to the annual sales of natural gas at Great Falls and Black Eagle less than 1,680,000,000 cubic feet per annum is unreasonably low. We would be justified, under this record, in adopting a higher estimate but we select 1,680,000,000 cubic feet as expressing a figure that should be taken as the absolute minimum for constructing a rate for natural gas at Great Falls.

Estimate of Property and Business Investment

The following table, taken from page 6 of the rate study, indicates the manner in which the value of the utility's property and business is computed as of the estimated period: [Table omitted.]

Artificial Gas Plant

[9] Included in the above set-up is the value of the Utility's artificial gas plant which Foster values as of January 1, 1928, at \$253,025. This fixture is exclusive of the land upon which the plant is situated. The plant for manufacturing artificial gas has been shut down and is not being used by the Utility in connection with its natural gas service at Great Falls. However, it suggests that inasmuch as it has no definite assurance as to the length of time that natural gas will be available for distribution at Great Falls and vicinity, it should be permitted to retain this plant so that in the event there should be a failure of the natural gas supply it would be in a position to re-

P.U.R.1928E.

open the artificial plant and do business on the old basis. If there was any evidence in this record to indicate that there exists a reasonable doubt as to the availability of natural gas for many years to come, the Utility's suggestion could be considered as having some merit, but where it appears that the Utility and the Pipe Line Company have invested or will have invested by the time their several investments are completed, tremendous sums of money, reputed to be over two million dollars, the implication is clear that a thorough investigation has been made of the source of supply and that it is the judgment of experts that the life of the field from which the supply will be drawn will be long enough to justify the enormous outlay of money. The possibility of a failure of the Utility's natural gas supply is entirely too remote to justify the inclusion of the artificial gas plant in its capital account on which it may justly claim to be entitled to a fair and reasonable return. In the value of the Utility's property, the Commission is limited to a consideration of only such property as is actually used or useful for the convenience of the public (§ 3884, Revised Codes of Montana, 1921). The manufacturing plant, being confessedly not in use and its necessity as a stand-by unit affirmatively overcome by the record, it should not be included in the rate base.

[10] In dealing with property and enterprises devoted to the public service, equity and fair dealing approve the rule that where patents, new processes, contracts for cheaper power, or other progressive features are introduced, with the effect of quickly rendering obsolete and valueless expensive equipment that has not been exhausted in the service, and of reducing operating expenses, the utility should be permitted to treat the superseded property as unusual obsolescence to be amortized out of earnings, or the value of the patent, new process, or contract should be determined and capitalized as a part of the rate basis (Pacific Gas & E. Co. v. San Francisco, 265 U. S. 403, 68 L. ed. 1075, P.U.R.1924D, 817, 44 Sup. Ct. Rep. 537; Duluth Street R. Co. v. Minnesota R. & Warehouse Commission, 4 F. (2d) 543, P.U.R.1925D, 226; Valparaiso Lighting Co. v. Public Service Commission, 190 Ind. 253, P.U.R.1921B, P.U.R.1928E.

325, 129 N. E. 13; Bonbright v. Arizona Corp. Commission, 210 Fed. 44, Chap. XIX and XXVII, Whitten-Wilcox, "Valuation of Public Service Corporations," 1928 Edition). In the event the manufacturing plant should be eliminated from its capital account, the Utility requests that it be permitted to amortize the value of its superseded property immediately, that is, over a period of years commencing at once. We concur in the suggestion but by reason of the fact that we are without sufficient information, we cannot prescribe a fair amortization order. The record herein merely gives us the Utility's estimate as to the present depreciated value of the artificial gas plant and the market value of the land appurtenant thereto. Until we are advised as to the cost of dismantling the plant, the revenue that will likely be derived from salvage, and other related information, we cannot determine the amount that should be amortized nor the number of years over which the plan of amortization should extend. We will retain express jurisdiction in this proceeding for the purpose of receiving from the utility its proposal of a plan of amortization and to receive evidence relevant to said plan and to promulgate a proper order in this respect.

Construction Expenditures, Jan. 1, 1921, to Jan. 1, 1928

[11] Between January 1, 1921, and January 1, 1928, the Utility's records, according to Foster, show construction expenditures in the sum of \$219,322 and this amount is set up in the estimated rate base. Included in this item, however, are expenditures for bond discount. On page 1 of the rate study there appears a segregation of the property additions by years during the aforementioned period. They aggregate \$212,355. The difference between \$219,322 and \$212,355, namely \$6,967, represents discount on bonds. In the 1922 Great Falls Gas Company decision, 15 M. U. R. 379, P.U.R.1922D, 381, we declined to allow the Utility to capitalize bond discount in its rate base, stating that the rule approved by this Commission requires, rather permits, actual bond discount to be amortized over the period of the bonds. The inclusion of bond discount in the estimated rate base is erroneous.

[12, 13] This item is subject to a further criticism. As-P.U.R.1928E.

suming that the book cost of the construction during this period is identical with cost of reproduction new, the estimate does not take into account the amount of depreciation now actually existent in this property. Foster explains his action in omitting a deduction for depreciation with the statement that the Utility did not earn sufficient revenues to take care of a reasonable rate of return and depreciation. This explanation is entirely beside the point; neither the hand of time nor the processes of deterioration due to use have been stayed by any inability on the part of the Utility to set aside out of its revenues amounts sufficient to cover accrued depreciation. The property has in fact depreciated and it is present value that is important in this proceeding. In the absence of an estimate by the Utility as to actual depreciation in the property added since January 1, 1921, we feel justified in the assumption that 2 per cent per annum, the depreciation annuity fixed by the Commission in the 1922 case, *supra*, when applied to the age of the property added during the period elapsed since said decision, will afford us a fair estimate of the amount of accrued depreciation in the additions. Excluding depreciation from consideration for the year in which new property was added, we believe that the sum of \$8,371.42 represents a fair estimate of the accrued depreciation in property added from January 1, 1921, to the first day of this year. In other words, we do not believe that the property set up should carry as the present value of additions made between January 1, 1921, and January 1, 1928, at a sum in excess of \$204,000.

Additional Distribution Lines and Belt-Line

To accommodate 6,000 customers, Foster estimates the Utility will have to add approximately twenty-eight miles of 3-inch equivalent mains at a cost of \$190,000. Additional services, meters, and regulators are figured at \$92,950 and the estimated cost of a belt-line and feeder is placed at \$151,480. While these estimates appear to be outside figures, we cannot say that they are unreasonably high.

P.U.R.1928E.

Working Capital

[14] Working capital is estimated at \$35,000. In the 1922 case, *supra*, at p. 420 of P.U.R.1922D, we approved the rule that "this item ought to be a practical conception and concretely established from the company's books." Obviously, we cannot apply that rule until the Utility reaches the established stage. The tentative figure submitted represents, in round numbers, a sum equal to one-twelfth of the estimated annual operating expenses. It appears to be a fair estimate and will be tentatively accepted until such time as experience indicates the actual amounts that are required to be tied up in material and supplies and in cash on hand for the payment of employees and the regular discharge of accounts payable.

Cost of Financing

[15] An allowance of \$127,000 is claimed for "cost of financing." The reasons underlying this claim are the same as the ones suggested by the utility in Docket No. 791 (15 M. U. R. 379, at 409 et seq. P.U.R.1922D, 385), wherein it claimed an allowance of 10 per cent for cost of financing. The claim was there rejected and the item eliminated from the rate base. We see no reason for including it now.

The leading case on cost of financing is Galveston Electric Co. v. Galveston, 258 U. S. 388, 66 L. ed. 678, P.U.R.1922D, 159, 42 Sup. Ct. Rep. 351, wherein the Supreme Court of the United States affirmed the decree of the United States District Court for the Southern District of Texas dismissing the company's complaint against a rate ordinance of the city of Galveston. In the court below the master had allowed an item of \$67,078 for brokerage, to which the city took exception. Judge Hutcheson in the District Court sustained the exception and excluded the item, saying (272 Fed. 147, P.U.R.1921D, 547, 562, 563):

"I cannot see that this item stands on any different footing than an interest charge for obtaining money, and it has for a long time been recognized that the interest which complainants P.U.R.1928E.

pay upon their bonds, or for the securing of money, has no part in a rate controversy.

"The value of the property in these cases is determined by its cost, either actual or reproduction, and this cost cannot truly be said to be increased or diminished by the rate of interest paid; but such interest charges as are paid must be taken care of annually, and not capitalized on for a permanent earning basis. As to this particular plant, under the facts I hold that its brokerage, if it paid any, has or should have been amortized long ago, for, as the Supreme Court said, in the Knoxville Water Company case [212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148] speaking of the effort on the part of the company to obtain a higher valuation on account of the depreciated property through failure to make replacements:

"If, however, a company fails to perform this plain duty, and to exact sufficient returns to keep the investment unimpaired, whether this is the result of unwarranted dividends upon over-issues of securities, or of omission to exact proper prices for the output, the fault is its own. When, therefore, a public regulation of its prices comes under question, the true value of the property then employed for the purpose of earning a return cannot be enhanced by a consideration of the errors in management which have been committed in the past."

"If it is sought to include brokerage on the ground that this is merely an assumed brokerage, upon the theory that in the reproduction it would be necessary to pay the brokerage, the answer to that contention would be twofold:

"(1) There is no basis for such an assumption here, in view of the actual facts in this case, as to the method by which this plant was created through a long period of time, by accretions.

"(2) If in any case brokerage is allowable, I incline to the method suggested by the defendants of amortizing it through the period in which the franchise has to run, rather than setting it up as a permanent addition to the capital, making a return on it of 8 per cent per annum a perpetual charge against the public."

On the appeal the Supreme Court of the United States, *supra*, speaking through Mr. Justice Brandeis, approved the exclusion
P.U.R.1928E.

of the item with the following language (258 U. S. 388, 397, P.U.R.1922D, 159, 167):

"The other item included by the Master in determining base value, but disallowed by the Court, is \$67,078 for brokerage fees. There is no evidence that any sum was in fact paid as brokerage, and there was included, as shown above, the sum of \$73,281 for organization and business management in calculating the historical reproduction cost. The finding of the Master rests upon testimony that bankers customarily get, in some form, compensation equal to 4 per cent on the money procured by them for such enterprises. But compensation for bankers' services is often paid in the lessened price at which they take the company's securities, and is thus represented in the higher rate of interest or dividend paid on the money actually received by the company as capital. The reason given by the Master for including the allowance for an assumed brokerage fee, is that a brokerage fee is 'a normal incident of large industrial investments, and has not been amortized', since 'the record shows that the plant has been operated at a loss.' If base value were to be fixed by the money expended, brokerage fees actually paid might with propriety be included, as are taxes paid pending construction. But as the base value considered is the present value, that value must be measured by money; and the customary cost of obtaining the money is immaterial. We cannot say that the court erred in refusing to include in base value an allowance for hypothetical brokers' fees."

In Minneapolis v. Rand, 285 Fed. 818, 829, the United States Circuit Court of Appeals for the Eighth Circuit, dismissed the Minneapolis Gas Light Company's claim for cost of financing in a valuation for rate purposes in the following language:

"The cost of financing is assumed upon the theory that a company, desirous of establishing such a plant, should not be possessed of sufficient capital to pay for the plant and should be compelled to borrow money by floating securities through brokers and should be exposed to large discounts if compelled to obtain money in this way. The fair value of the plant should not be estimated upon such a basis of impecuniosity and exactions, but P.U.R.1928E.

upon the theory if used, of reconstruction, by those financially able to build the plant, paying reasonable prices therefor."

In Reno Power, Light & Water Co. v. Public Service Commission, 300 Fed. 645, 667, Judge Farrington rejected an item of \$65,524 for brokerage, saying:

"The argument in favor of an allowance for brokerage is not convincing. The basis of the rate is the reasonable value of the property. What it costs is a circumstance to be considered in determining its reasonable value. So, also, is the interest on money during construction. One man constructs a utility plant with his own money, or with money which he is able to borrow on his own credit, and, therefore, pays no brokerage or discount. Another has no money of his own, and but indifferent credit; in order to procure money to purchase or construct the plant, he is obliged to employ a broker, and issue stock and bonds, probably at a discount, which may be much or little varying with his credit, and the probability that his enterprise will be profitable. Other things being equal, why should the second plant be valued higher than the first? Money must be used in the construction of a plant, and the reasonable value of its use is as real and essential an element in the reasonable value of the property as the labor of the men who dig the canals; hence reasonable interest during construction is a proper item in calculating reproduction cost whether the owner uses his own funds or borrowed money. But the expense incurred in promotion, selling stock and bonds, or in otherwise procuring money on which interest will be paid, adds nothing to the value of the plant. It is to be classed with interest paid on bonded debts. The owner will receive a fair return on the reasonable present value of his property devoted to public use; this is all he is entitled to, and out of this it is but just that he should pay his debts, the principal and interest due on his bonds, and any expense which he has incurred in procuring funds, whether it be in the sale of stock and securities, or for promotion, brokerage, discount, or bonuses, and for this, if his enterprise is prudently conceived and conducted, his return will be sufficient compensation, as in P.U.R.1928E.

the instant case the rate of return on the property is larger than the rate of interest paid on the bonds."

In a later case between the same litigants (298 Fed. 790, P.U.R.1923E, 485, 494), Judge Farrington had the following to say concerning brokerage:

"One man with abundant capital or excellent credit may be able to construct a plant without employing brokers or issuing bonds; another with little capital and but indifferent credit may be obliged to pay large fees for marketing his securities, and realize from them much less than their face value. This cost of obtaining capital to erect a public utility plant is not property which will be used in serving the public. It is not basic value. It is an index of the promoter's lack of credit and capital, rather than of reasonable value."

The decided weight of authority is against the inclusion of cost of financing as an element of the rate base in a valuation of property of a public utility for rate-making purposes (See Com. ex rel. Roanoke v. Roanoke Water Works Co. (Va.) P.U.R.1925B, 303, for a summary of authorities).

Going Value

[16] With reference to the element of value generally characterized as "going concern value" the Utility sets up the amount of \$200,000, which it characterizes as "very modest." In our opinion a specific allowance for going concern value is not justified by this record.

Going value has been variously defined. We quote the following from a standard author (See Whitten-Wilcox "Valuation of Public Service Corporations," § 740, 2d Edition (1928)):

"Going value is a peculiarly elusive concept which has arisen from the desire or the necessity of splitting up intangible value and preserving a residuum after the exclusion of franchise value and good will. What seems like a simple definition of going value is: That amount by which the value of a utility plant in operation, with customers and an established revenue, exceeds the value of an exactly similar plant all ready to go, or going, without any customers or revenue, but so situated that the acquisition of customers and revenue is a mere matter of time and ordinary P.U.R.1928E.

adjustments. Conceived in this way going value is supposed to steer clear, on the one side of good will, which can have value chiefly in the absence of monopoly and on the other side, of franchise value which arises chiefly out of monopoly. Thus going value is not derived from competition; nor from monopoly either. It is clear that a purchaser investing in property for the sake of the income to be derived from it will pay more for a property with a developed income than for a property without it. That difference is going value in a purchase case but, mark you, if the question is one of valuation for rate purposes, you must squeeze goodwill and the franchise all out of the concept. As a result of these limitations one might almost say that going concern or going value in a rate case is that element of value with respect to which Commissions and courts throw out all the testimony of the experts and then make their own guesses, and this disposition of the element—where it is allowed at all—seems to be inevitable for the reason that no specific method of measuring going value thus far proposed by the experts seems to redeem the subject from a morass of hypothetical fact and fantastic conclusion."

In a recent decision of this Commission, *Re Union Electric Co.* Report & Order No. 1518, 21 M. U. R. —, P.U.R.1928E, 396, 404, decided August 25, 1928, we held that where a public utility is valued as a going concern, it is not proper to make an arbitrary separate allowance for going concern value. We there said:

"That 'good will'—indicating that element of value which inheres in the fixed and favorable consideration of customers, resulting from an established and well conducted business—has no place in the fixing of valuation for the purpose of rate making of public service corporation, has been the accepted rule since the decision of the Supreme Court in *Wilcox v. Consolidated Gas Co.* 212 U. S. 19, 52, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 48 L.R.A.(N.S.) 1134, 15 Ann. Cas. 1034. On the other hand, it is equally well established that 'going concern'—indicating that value which inheres in a plant where its business is established, as distinguished, from one which has yet to establish its business—is an element of value that constitutes a P.U.R.1928E.

property right that must be considered in fixing the value of the property upon which the owner has a right to earn a fair return when his property is dedicated to a public use. *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153, 59 L. ed. 1244, P.U.R.1915D, 577, 35 Sup. Ct. Rep. 811. No rule of thumb or formula has been devised whereby 'going concern' value may be definitely measured. In fact, a survey of the decided cases—Commissions and courts—compels the conclusion that there is no uniformity in approach or in results as between Commissions or as between courts. The method commonly employed by Commissions and courts in assigning a monetary value to 'going concern' is to allow a certain percentage of the value attributed to physical elements comprising the utility's property. This appears to be an indefensible method and involves sheer guesswork. Having in mind the *Des Moines Gas Case, supra*, and *Galveston Electric Co. v. Galveston*, 258 U. S. 388, 66 L. ed. 678, P.U.R.1922D, 159, 42 Sup. Ct. Rep. 351, cases wherein the Supreme Court of the United States affirmed the actions of the lower courts in refusing allowances for 'going value' in addition to percentage allowances—12 and 13.3 per cent—of the base cost of labor and materials for overheads and expenses of organization and business management—neither of which cases have been reversed—we believe that where a utility property is valued on the basis of reproduction cost new, less depreciation, and the items of organization, expenses, etc., are taken into consideration and included in a general allowance for overheads, and the subsequent business development costs are paid out of operating expenses, no additional sum should be allowed for going concern value. This view has the support of recent cases and recent pronouncements of text-writers on the subject. See *Hardin-Wyandot Lighting Co. v. Public Utilities Commission*, 118 Ohio St. —, P.U.R.1928D, 560, 162 N. E. 262; *Portsmouth Gas Co. v. Public Utilities Commission*, — Ohio —, 162 N. E. 106; *Cincinnati v. Public Utilities Commission*, 113 Ohio St. 259, P.U.R.1925E, 432, 148 N.E. 817; *Capital Water Co. v. Public Utilities Commission*, 44 Idaho, 1, P.U.R.1928C, 473, 262 Pac. 863; *Groninger on Public Utility Rate Making* (1928) p. 84; *Whitten on Valuation of Public Service Corporations*, P.U.R.1928E.

tions, 2d Edition, Chap. XXIX; Lewis on 'Going Value and Rate Valuation,' article in Michigan Law Review, Vol. XXVI, May, 1928; Bemis on 'Going Value in Rate Cases' in the Supreme Court, article in Columbia Law Review, Vol. XXVII, May, 1927. . . . Under our uniform classification of accounts such items appertaining to the cost of attaching business as advertising, soliciting, appliances, demonstrations, etc., are charged to operating expenses. Under these circumstances we feel that we are giving to the element of going concern the consideration and value that it deserves. Where the cost of attaching and developing the business has been paid by the consumers, our failure to give that fact due and proper consideration in the valuation of a utility as a going concern would have the effect of compelling consumers to pay an income on items of cost or value furnished by them."

That language is peculiarly appropriate to this case. In its set up the Utility has applied to labor and material prices the percentages allowed in the 1922 case (15 M.U.R. 379, P.U.R.1922D, 385) for overheads, namely: engineering and superintendence, 4 per cent; interest during construction, 4 per cent; insurance, 1 per cent; omissions and contingencies, 2 per cent; and organization and legal expense, 3 per cent. It has in the past paid the cost of attaching and developing its business out of operating revenues (15 M. U. R. at p. 417) and it has the undoubted right in the future to absorb such costs in similar manner. While in the 1922 case, *supra*, the Commission was substantially of the same mind that it now is respecting the proper method of giving effect to going concern value in a valuation for rate making, it made an arbitrary allowance of \$10 per consumer as representative of any possible uncompensated value of their attachment to the business "in order that no injustice be done." If that method were followed in the instant case, the arbitrary value of the Utility's going concern value on the basis of 6,000 consumers would be \$60,000 instead of \$200,000.

Cost of Gas.

According to the rate study the Utility will pay to the Pipe Line Company for gas purchased during the estimated year the P.U.R.1928E.

sum of \$324,000. That sum represents the cost of 1,200,000,000 cubic feet (measured on a standard or base pressure of 8 ounces above an assumed atmospheric pressure of 14.4 pounds and at 60 degrees Fahrenheit), at 27 cents per 1,000 cubic feet.

Foster assumes in connection with the cost of gas that the Utility will suffer a line loss—unaccounted for gas due to leakage in the mains, condensation, theft, etc.,—of 20 per cent. In other words, his assumption is that the amount of gas estimated to be sold during the estimated year, namely, 1,103,992,000 cubic feet, equals but 80 per cent of the amount that the Utility will have to purchase from the Pipe Line Company. On that basis the Utility would buy 1,375,000,000 cubic feet of natural gas, measured on a base pressure of 4 ounces over atmospheric pressure. By reason of the increase in the volume of gas that accompanies a conversion from a higher pressure base to a lower one, as above explained, Foster says that it will only be necessary to purchase 1,200,000,000 cubic feet on the higher pressure base in order to deliver the 1,103,992,000, estimated sales, and absorb a line loss of approximately 271,000,000 cubic feet. Stated in percentages, the increase Foster assigns to the change in base pressure is 14.58 per cent. This exceeds by 2.38 per cent the percentage increase found by the application of Diehl's formula *supra*, based on Boyle's or Mariotte's law of gases. This variance might be accounted for on the theory above adverted to, namely, that natural gas does not conform 100 per cent to the laws of perfect gases; that there is a deviation and the amount of the deviation varies with various natural gases, depending upon the composition of the gas and that various volumes of natural gas at high pressure will occupy slightly greater volume at lower base pressures than would be obtained by the use of the above formula.

[17] However, whatever generosity exists in the estimate as to the amount of natural gas required to be purchased, is more than offset, in our judgment, by the estimate of 20 per cent for line losses. This amount is unreasonably high. In 1927 the Great Falls Gas Company reported to the Commission a 12.66 per cent line loss; Havre, 12.40 per cent; Shelby, 10.22 per cent; Chinook, 5.65 per cent; Billings, none (due to the fact that P.U.R.1928E.

under the Billings utility's contract with the Gallatin Natural Gas Company, it settles on the basis of gas delivered to the customers' meters), and the Montana-Dakota Power Company, which commenced selling natural gas to Miles City, Glendive, and Terry, Montana, and Marmarth, North Dakota, early in 1927, piping its own supply from the Cabin Creek and Water Dome gas fields, reported 18 per cent for the entire system, including the pipe lines leading from the gas fields. Havre's line loss of 12.40 per cent for 1927 will be substantially reduced in 1928 according to the testimony in the record of the office manager of the Havre Natural Gas Company. We believe that any estimate that places line loss at a percentage in excess of 12½ per cent is unreasonable.

If the percentage of line loss is reduced to 12½ per cent, the amount of gas required by the Utility on the lower pressure base will be 1,262,705,000 (i. e. 1,103,992,000 plus 157,713,000). Using Diehl's formula, *supra*, for converting this quantity into the pressure base upon which the Utility purchases we arrive at the figure 1,124,526,400 cubic feet, as being the amount of gas that the utility would have to purchase from the Pipe Line Company at 27 cents per M to sell 1,103,992,000 cubic feet and absorb a 12½ per cent line loss. The cost of gas under this set up would be \$303,622.12 as against \$324,000 set by Foster, a difference of \$20,337.88.

From a consideration of the fact that for each 1,000 cubic feet the Utility purchases from the Pipe Line Company on the base pressure provided in its contract it is able to deliver to its customers 1,122 cubic feet, it is obvious that the cost of gas per thousand cubic feet on a pressure base of four ounces above atmospheric is 27 cents divided by 1122 multiplied by 1,000 or 24.064 cents per thousand cubic feet. This gives Great Falls a wholesale rate for its natural gas which is less than the average paid in Billings for the past two years where the Utility buys on a sliding scale. Billings Gas Company for 1927 paid the Pipe Line Company \$306,911.42 for 1,204,154,400 cubic feet or on an average of 25.48 cents per thousand cubic feet and in 1926, it paid at the rate of 25.32 cents per thousand cubic feet. Bill-P.U.R.1928E.

ings gas is bought and sold on the same pressure base—four ounces above atmospheric.

[18] Whether or not the rate of 27 cents per thousand cubic feet when corrected to the contract pressure base is a reasonable or unreasonable wholesale rate, we are not in a position from this record to judge. Some of the participants have characterized the contract between the Utility and the Pipe Line Company as improvident but the mere unsupported assertion is not sufficient upon which this Commission can make a specific finding. So far as this case is concerned we are bound to proceed upon the assumption that the rate charged the Utility by the Pipe Line Company is not unreasonable. This will leave the question open to a determination in a proper proceeding, if it should arise.

Distribution, Commercial, Etc., Costs

[19] The total cost of operations (not including cost of gas purchased, or taxes) figures from Foster's estimates of \$0.06885 per thousand cubic feet of gas sold. Contrasted with this estimate is the experience of the Billings Gas Company, which, for the last five years shows operating costs (excluding cost of gas purchased and taxes) per thousand cubic feet of gas sold, as follows: 1927, \$0.0507; 1926, \$0.04742; 1925, \$0.04246; 1924, \$0.0523, and 1923, \$0.0734, or an average of \$0.0532 (for the five years) per thousand cubic feet sold. We see no justification for the estimates that producing an operating cost per thousand cubic feet of gas sold (excluding cost of gas purchased and taxes) over a cent and a half in excess of a figure which five years' actual experience in this field has proven to be the average. It is idle to say that conditions are different at Billings because whatever difference there exists between the situation at Great Falls and Billings from a cost of operation standpoint works to the disadvantage of the Billings Gas Company, which instead of operating in a relatively small, compact territory, operates in six cities, maintains six distribution systems, with their incidental supervision and maintenance, and relatively has a higher commercial expense. As the consumption increases, this cost per M cubic feet should decrease in accordance with the recognized fact that it costs relatively less to fur-

P.U.R.1928E.

nish a larger quantity than a smaller quantity. The fact must be recognized, however, that in the transition from an artificial plant to a natural gas business, the Utility will initially be put to some extraordinary expenses, such as adjusting the burners to natural gas, and will initially have higher commercial expenses than are considered ordinary due to necessary appliance demonstrations, advertising, and development work. Considered over a period of five years, it is our judgment that an average operating cost per M cubic feet sold, excluding cost of gas purchased, taxes and depreciation, should not exceed \$0.055.

Taxes (Regular)

In the estimate of operating expenses appears the item "Taxes, \$8,200." This comprehends the general property taxes levied by state, county, and city. A portion of this estimated sum represents taxes upon the artificial gas plant and land heretofore used in connection therewith. Because the Commission has come to the conclusion that the artificial gas plant and the land appurtenant to it do not constitute property "used or useful for the convenience of the public," this item for taxes is excessive. However, in other respects the estimate appears to be within reasonable bounds.

Franchise Tax

[20, 21] As part of the operating expenses Foster sets up the sum of \$11,000 to cover a 2-per cent gross receipts tax payable to the city of Great Falls.

In January, 1908, the city of Great Falls granted to Charles V. Gordon, his associates, successors, and assigns, the right for thirty-three years to erect and maintain a gas manufacturing plant within the city limits and to excavate and lay pipes, etc., for the proper distribution of gas in and through the streets and alleys of Great Falls (subject to certain exceptions not material here). Section 5 of the franchise ordinance (Ordinance No. 310) contains the following proviso:

"The grantee, herein in consideration of the granting of this franchise, shall during the life of this franchise pay to and for the use of the said city of Great Falls an amount equal to 2 P.U.R.1928E.

per cent of their gross receipts from the sale of gas in the said city; the payments to be made to said city on or before January 10th, of every year for the gas sold the preceding year. . . ."

This tax is in addition to the regular state, county, and city taxes, and when paid is properly chargeable to operating expenses.

The obligation imposed by § 5 of the franchise ordinance was doubtless imposed upon the theory that the corporation would have to bear it. The fact is, however, that it is the gas consumers—not the company—who have to pay. In practical operation it discriminates against the ratepayers of the Utility in favor of the taxpayers who are not users of the utility's service. It is a "painless" method of raising revenue for municipal purposes but its exaction from the utility is bound to be reflected in higher gas rates or lowered service. In *Re Helena Light & R. Co.* 14 M. U. R. 282, P.U.R.1922A, 112, 124, we characterized a similar gross receipt tax as "a relic of the days when franchises were evolved out of a spirit of bargain and sale, with no clear conception of the street railway's function as a public service corporation and without regard for patrons' right to a service burdened by as few operating costs as possible, whether imposed by public or private agency." This form of indirect taxation upon consumers is now quite generally recognized as fundamentally and economically unsound. While it might be considered perfectly natural that a municipality, anxious to keep down the local tax rate by which it is so largely judged, should seek to unload upon public utilities a portion of the burden of providing revenues for municipal requirements, such a policy necessarily reacts upon the public served by the utilities. A public utility has no mysterious sources of revenue, but must obtain its funds from the people that use its service. Any burden imposed upon the utility must ultimately be borne by these consumers. We can see no difference in principle between a franchise provision that imposes a gross receipts tax upon a utility and one that imposes the burden upon the Utility of furnishing a city with its service free for municipal purposes, or one that imposes upon a street railway the burden of paving streets upon which it lays its tracks. They are all species of special taxation which dis-

criminate against ratepayers. In more recent years Public Service Commissions have been stepping in and relieving the consumers of these onerous and discriminatory burdens (Re Phoenix Street R. Co. (Ariz.) P.U.R.1926A, 671; Com. ex rel. Virginia R. & Power Co. v. Portsmouth (Va.) P.U.R.1924B, 130). This Commission, in Public Service Commission v. Billings Utility Co. 11 M. U. R. 187, relieved a heating utility of the burden of providing the city of Billings with free heat for its municipal buildings in the face of a franchise ordinance requiring as one of the conditions of occupying the streets and alleys of Billings that such free heat be furnished. The city of Billings carried our decision to the supreme court of Montana (Billings v. Public Service Commission, 67 Mont. 29, P.U.R.1923E, 77, 83, 214 Pac. 608), where our action was affirmed by the court, which said, in part:

"Discrimination of this sort is not to be tolerated, and the Commission was right in putting a stop to it."

In our original opinion in the case, we said:

"That the ordinance in question is a contract is evident, but it is a contract between the state on one side (through its agent the city) and the utility on the other. Such rights as the municipality of Billings has under this contract are granted to it by the state and are subject to modifications or withdrawals by the state. The Commission deems it well settled by the decision of the supreme court of the state of Montana in State ex rel. Billings v. Billings Gas Co. 55 Mont. 102, P.U.R.1918F, 768, 173 Pac. 799, that it has full and exclusive jurisdiction over the subject of rate regulation, and it regards the free service clause of this ordinance as so intimately connected with the making of a rate that to separate the two is impossible and it seems impracticable to consider the rate question except in connection with the question of free heat.

"The Commission is of the opinion that the furnishing of this free service, although in compliance with the terms of the ordinance, is a species of evident discrimination against those consumers who are required to pay a higher rate for heat. The furnishing of free heat under such conditions compels those consumers to bear a public burden which should equitably be borne P.U.R.1928E.

by all of the taxpayers of the city of Billings. The cost of the heat furnished the city is paid only by those consumers who purchase heat from this utility. The burden of taxation is thus unequally imposed."

If the state, armed with the police power and acting through a designated agency invested with the exclusive control, supervision, and regulation of public utilities, can strike down a rate-fixing franchise ordinance (See *State ex rel. Billings v. Billings Gas Co.* 55 Mont. 102, P.U.R.1918F, 768, 173 Pac. 799), can void a provision in a franchise ordinance requiring free utility service to a city (See *Billings v. Public Service Commission, supra*), and can relieve a utility of its franchise obligation to run street cars over a given line when the operation of such a line becomes onerous and burdensome (See *Helena v. Helena Light & R. Co.* 63 Mont. 108, P.U.R.1922E, 588, 207 Pac. 337), it ought to be able in the exercise of the same power to strike down other conditions in such an ordinance, the effect of which is to devote revenues of a utility which should go to the reduction of rates, or to the betterment of facilities or service, to the advantage of taxpayers of a city generally and to the disadvantage of ratepayers.

If the Utility were to continue to pay a gross receipt tax to the city of Great Falls, it would be incumbent upon it to keep separate account of the gas sales within the city of Great Falls as the tax is imposed upon "*gross receipts from the sale of gas in the said city.*" The revenues derived by the Utility from the sale of natural gas at Black Eagle, and other points outside the corporate limits of Great Falls, would not be subject to the 2-per cent gross receipts tax and it would follow as a matter of course that consumers residing outside the city limits would be entitled to a rate schedule that would reflect the lesser cost. We would then have the spectacle of a consumer living just inside the corporate limits paying more for his natural gas than a consumer living just outside the city limits, although the service in each case would be identical. Such a discriminatory situation cannot be tolerated.

It is our judgment, and we so hold, that payment of the gross receipts tax by the utility will result in unlawful discrimination.

P.U.R.1928E.

tion against consumers of natural gas living within the corporate limits of Great Falls in favor of taxpaying nonconsumers living within the city limits and in favor of consumers living in Black Eagle and at other points outside of the corporate limits of Great Falls. The Utility is, therefore, relieved of the burden imposed by § 5 of Ordinance No. 310 of the ordinances of the city of Great Falls, and is directed to not pay said gross receipts tax. The item will accordingly be eliminated from the estimate of operating expense.

Our conclusion does not encroach upon any right of self government in purely local matters vouchsafed to the municipality by constitutional or legislative provision. As was said by the supreme court of Montana, in *Helena v. Helena Light & R. Co.* *supra*, at p. 595 of P.U.R.1922E:

" . . . the state may, through the Public Service Commission, relieve the railway company of the burden (franchise burden) thus imposed (citing a case from the Supreme Court of the United States), and this conclusion does not impinge upon the right of the inhabitants of a municipality to a measure of self-government with respect to matters of purely local concern. The streets of a city are public highways (§ 1612, Rev. Codes, 1921), and though the city is charged with the duty of keeping them in repair and the cost of maintenance is imposed upon the city, nevertheless, jurisdiction over them is primarily in the state, and the city acts with respect to them subject to the general laws of the state."

We deem this language particularly apropos of the instant situation because the consideration for the burdensome franchise tax imposed was the right to the use of the streets and alleys of Great Falls for the purpose of laying down gas mains.

Operating Revenues

Foster estimates that from the sale of 1,103,992,000 cubic feet of natural gas the Utility will derive \$571,434, or on the average of 51.76 cents per M cubic feet of gas sold. It follows from our conclusion that the estimated sales are unreasonably low that the estimate of annual revenue is likewise unreasonably low. On the assumption that the Utility will derive 51.76 P.U.R.1928E.

cents per M cubic feet sold, our estimate of the annual sales (1,680,000,000 cubic feet), would yield revenue in the amount of \$869,568, substantially \$300,000, above Foster's estimate. If Foster's assumed 6,000 customers consumed on the average of 240,000 cubic feet of gas per annum, which we have found to be a reasonable estimate of the minimum average per customer consumption, the annual revenue at 51.76 cents per M cubic feet sold would be \$745,344, or approximately \$174,000 more than the rate study estimate.

Depreciation Annuity

[22] The utility claims that it should be permitted to annually set aside 8 per cent of the value of its mains, services, meters, regulators, and general equipment to cover depreciation. By reason of our former holdings, allowing a liberal reserve for depreciation in the case of natural gas utilities, we are not disposed to question the claim but will allow an annual set up of 8 per cent on all the elements of physical depreciable property, less land, to be computed on the basis of the actual value of the physical property, that is, reproduction cost less depreciation.

Federal Income Tax

From its estimated net income after depreciation the Utility in its rate study makes a deduction in the sum of \$6,000 to cover its estimate of income tax that it will have to pay the United States. Under the Federal law corporations are required to pay an income tax of 12½ per cent on their net income, and their stockholders, as individuals, are relieved from including the dividends received in their taxable income. Whether this tax should be treated as an operating expense, in the same manner that general taxes are treated and be passed on to the consumer in the form of higher rates for service, or whether Federal income tax should be treated as a deduction from income and go to the reduction of dividends otherwise payable was a much mooted question until the decision of the Supreme Court in Galveston Electric Co. v. Galveston, 258 U. S. 388, 66 L. ed. 678, P.U.R. 1922D, 159, 169, 42 Sup. Ct. Rep. 351, wherein the Court held that Federal income tax was to be included in operating ex-
P.U.R.1928E.

penses the same as any other tax, but that it was proper in fixing a fair rate of return to take cognizance of the deduction. In that case, Mr. Justice Brandeis, speaking for the Court, said:

"In calculating whether the 5-cent fare will yield a proper return, it is necessary to deduct from gross revenue the expenses and charges; and all taxes which would be payable if a fair return were earned are appropriate deductions. There is no difference in this respect between state and Federal taxes or between income taxes and others. But the fact that it is the Federal corporate income tax for which deduction is made, must be taken into consideration in determining what rate of return shall be deemed fair. For under § 216 the stockholder does not include in the income on which the normal Federal tax is payable dividends received from the corporation. This tax exemption is, therefore, in effect, part of the return on the investment."

In the later case of Georgia R. & Power Co. v. Railroad Commission, 262 U. S. 625, 67 L. ed. 1144, P.U.R.1923D, 1, 6, 43 Sup. Ct. Rep. 680, the subject was again before the Court and in holding that the lower court erred in disallowing Federal income tax as a proper operating charge, Judge Brandeis, speaking for the Court, again remarked that the fact of this deduction should be taken into consideration by a regulatory Commission in determining the fair rate of return. To quote Mr. Justice Brandeis:

"It must be borne in mind, as pointed out in Galveston Electric Co. v. Galveston, *supra*, that, since dividends from the corporation are not included in the income on which the normal Federal tax is payable by stockholders, the tax exemption is, in effect, an additional return on the investment. A return of $7\frac{1}{4}$ per cent—in addition to this tax exemption—can not be deemed confiscatory."

[23] A difference of opinion has arisen as to the manner of giving effect to the rule of the Galveston and Georgia Railway cases, *supra*. In Re Philadelphia Rapid Transit Co. P.U.R. 1926B, 385, 411, a decision by the Pennsylvania Public Service Commission, illustrates the divergent views. The majority of the Commission in that case held "the true rule under the Gal-P.U.R.1928E.

veston case, *supra*, and in York v. Public Service Commission, 85 Pa. Super. Ct. 139, in our judgment is to first include the total tax in expenses and then deduct *the amount of the resulting exemption* from the fair return otherwise allowable." The majority found that the "resulting exemption" amounted to 40 per cent and deducted that percentage of the estimated income tax from the allowable fair return. The minority held to the opinion that "the Commission should deduct the entire amount of Federal income tax included in operating expenses from the amount of fair return that would otherwise be allowed." We are inclined to view the majority decision as the correct method of measuring the resulting exemption to a stockholder.

Conclusions

Employing the estimates hereinabove found to be the maximum and minimum reasonable estimates that should be the basis of a schedule of natural gas rates for application at Great Falls, Montana, and vicinity, we arrive at the following estimates of (a) property and investment; (b) operating expenses; (c) operating revenues, and (d) return on investment:

(a) *Estimated Valuation of Physical Property and Business.*

Value of company's property as of January 1, 1921, on January 1, 1928, price basis (cost of reproduction new less depreciation) Foster's estimate	\$455,731.00
Value of additions made between January 1, 1921, and January 1, 1928 (Book cost \$212,534 less estimated depreciation of \$8,371.42)	204,162.58
Additional distribution for 7,000 customers	424,425.00
Cost of Belt-line and feeder	151,480.00
 Total	 \$1,235,798.58
Less value of artificial gas plant	\$253,025.00
and land	28,080.00
 Total physical property	 \$954,693.58
Fair allowance for working capital (estimated)	41,250.00
 Total property and business	 \$995,943.58

(b) *Estimated Operating Expenses.*

Cost of gas purchased	\$463,000.58
All other costs, except taxes	92,400.00
Taxes (regular—franchise tax excluded)	7,500.00
 Total	 \$562,900.58

P.U.R.1928E. 54

(c)	<i>Estimated Revenue.</i>
1,600,000 M cubic feet @ 51.76 cents (Foster's estimated average revenue per M cu. ft. under schedule of rates preferred)	\$869,568.00
(d)	<i>Estimated Return on Investment.</i>
Estimated investment in property and business (Table A)	\$1,023,943.58
Estimated operating revenues (Table C)	869,568.00
Estimated operating expenses (Table B)	562,900.00
Net before depreciation	\$306,668.00
Fair allowance for depreciation (8% on all physical depreciable property)	78,615.48
Net after depreciation	\$228,052.52
Deduction for Federal income tax (estimated at 12½%, current rate, after interest charges)	25,000.00
Deduction for estimated maximum reasonable annual amortization charge	20,000.00
Total available for return	\$183,052.52
Net return on property and business	17.87%

The above tables are constructed upon the basis of 7,000 customers, consuming annually 1,680,000 M cubic feet of natural gas. In Table A, we have increased the estimate of the cost of the additional distribution mains, etc., given by Foster at \$282,950, by the sum of \$141,475. This is an outside figure and is to be taken as a maximum reasonable estimate. In the same table we have increased the estimated fair allowance for working capital as submitted by Foster by 16½ per cent, representative of the percentage increase in our estimate of the number of consumers, namely, 7,000, over Foster's assumption of 6,000 consumers. In Table B, in figuring the cost of gas, we have proceeded upon the assumption that the quantity of gas sold, namely, 1,680,000 M cubic feet, constitutes but 87½ per cent of the amount the Utility will be required to purchase by reason of line losses. Thus the total purchased will be 1,924,000 M cubic feet, but inasmuch as this figure is on a pressure base of four ounces above atmospheric it must be converted to a base pressure of eight ounces above assumed atmospheric pressure of 14.4 pounds to determine the amount of gas the Utility will have to purchase at 27 cents per M cubic feet. By application of the formula, above used, we find this sum to be 1,715,000,000 cubic feet. Other operating costs, except taxes, are computed on the basis above suggested as the maximum, P.U.R.1928E.

to-wit: \$0.055 per M cubic feet of gas sold. Taxes are estimated upon approximately the same basis as that used by Foster; a reduction in his figure results from the elimination of the manufacturing plant and land appurtenant.

[24] A rate of return of 17.87 per cent is obviously unreasonable. In the 1922 Great Falls Gas Case, 15 M. U. R. 379, P.U.R. 1922D, 385, we allowed 8 per cent as a reasonable rate of return and we adhere to that standard herein. The allowance for return at 8 per cent is \$81,915.48 less a proper sum to conform to the views expressed by the Supreme Court of the United States in Galveston Electric Co. v. Galveston, *supra*, due to the fact that the Federal income tax is treated as an operating expense.

A schedule of rates for natural gas that will yield to the utility an average revenue of 45 cents per thousand cubic feet of gas sold would appear to be a fair and reasonable schedule. On that basis the situation would be thus:

Estimated investment in property and business	\$1,023,943.58
Operating revenue	756,000.00
Operating expenses	
Cost of gas	\$463,000.00
Other costs, except taxes	92,400.00
Taxes (regular)	7,500.00
	<hr/>
Net before depreciation	\$193,100.00
Fair allowance for depreciation	78,615.48
	<hr/>
Net after depreciation	\$114,484.52
Deduction for income tax (estimated)	11,000.00
Deduction for maximum reasonable annual amortization charge	20,000.00
	<hr/>
Total available for return	\$83,484.52
Net return on property and business	8.15%

The estimated rate of return is above our standard as above noted, but in view of the fact that the whole structure is based upon estimate and prediction, reasonable though we find them to be, we prefer to allow ourselves a margin of safety and the difference between a fair allowance and the estimated return is none too great to guard against possible error in prophecy. Then again, it will be recognized that the establishment of a rate schedule cannot in the nature of things be final and conclusive. New conditions may arise tomorrow which will make unreasonable, one way or the other, a rate which today is just and reasonable. The whole matter is continually under the supervision
P.U.R.1928E.

and scrutiny of the Commission, and can be reopened at any time, either on our own motion or on the petition of interested parties.

Now, as to a schedule of rates that will produce an average of 45 cents per thousand cubic feet of gas sold, after careful thought and consideration, we have determined upon the following schedule:

First	2,000 cubic feet	62.5 cents per M cubic feet
Next	98,000 " "	52 " " " "
Next	100,000 " "	47 " " " "
Next	100,000 " "	42 " " " "
Next	100,000 " "	37 " " " "
All over	400,000 " "	32 " " " "

The above rate, which we find just and reasonable for application as an initial rate for natural gas service at Great Falls and vicinity, is, to a certain extent, similar to the natural gas rate in effect in Billings, Montana. The Billings rate is identical with the above up to 500,000 cubic feet consumption point. From there the Billings rate proceeds as follows: next 100,000, 27 cents per M cubic feet; next 100,000, 22 cents per M cubic feet; and all over 1,000,000 cubic feet, 17 cents per M cubic feet. The history of the operations of the Billings Gas Company for the past three years shows that the operating revenue per M cubic feet of gas sold equals 45.74 cents for 1927, 45.67 cents for 1926, and 44.48 cents for 1925. It would, therefore, appear a safe prediction that if the Billings Gas Company with steps in its rate lower than the last step prescribed in the above schedule derives an average operating revenue per M cubic feet slightly in excess of 45 cents, considering its operations over a period of three years, the Great Falls Gas Company will receive at least an average of 45 cents per M cubic feet of gas sold. It is likely that it will average slightly better but we have adopted 45 cents as representing a reasonable minimum estimate.

The schedule above set forth and herein found to be a reasonable schedule of rates for natural gas service at Great Falls, Montana, and vicinity, will be ordered effective immediately, and to the end that we may at all times be advised as to the earnings of the Utility under the new tariff, we will require a monthly statement of its income and expense.

P.U.R.1928E.

Minimum Bill.

In May, 1922, this Commission, by a divided vote (Commissioners Boyle and Dennis voting in the affirmative—Commissioner Ross, dissenting), authorized the Great Falls Gas Company to increase its minimum bill from 50 cents per month—the minimum charge that prevailed from 1909—to \$1 per month (15 M. U. R. 379, 428, P.U.R.1922D, 385). In the utility's initial tariff for natural gas it submitted the proposal for a \$2 minimum, but, as above pointed out, it later receded from that position, and now proffers a minimum of \$1.50 per month, which, under its tariff, would permit the use of 2,000 cubic feet of gas for the minimum bill. In harmony with the schedule of rates herein found reasonable and in order to permit a consumer to use 2,000 cubic feet of gas for the minimum bill we will prescribe as reasonable a monthly minimum bill of \$1.25. While this sum represents an increase of 25 cents, it must be remembered that under the artificial gas rate schedule of \$1.75 for the first thousand cubic feet the consumer was only entitled to use 570 cubic feet for the minimum bill, whereas, under the new minimum he will be entitled to use almost four times that quantity of natural gas.

Special Penalty Provision.

The tariff as filed contains the following special provision:

"If bills are not paid on or before the tenth day after date of rendering, an additional charge of $\frac{1}{2}$ cent per 100 cubic feet of gas used shall be added."

In view of the fact that Rule 31 of our rules regulating gas service and gas utilities permits a gas utility to require from any consumer or prospective customer (not the owner of property served with gas) a deposit not exceeding the amount of an estimated forty-five days' bill to guarantee the payment of current bills, and Rule 32, authorizes the Utility to discontinue gas service to any delinquent consumer upon at least 24 hours' written notice of such intended discontinuance, we are of the opinion that the addition of a penalty, such as is proposed, would be an unreasonable burden and we, therefore, withhold our approval of the special provision.

P.U.R.1928E.

Young, Commissioner: I dissent from the above report and order, and will prepare and file in the above docket a statement setting forth my reasons for disagreeing with the majority of the Commission.

MARYLAND CIRCUIT COURT NO. 2 OF BALTIMORE CITY.

**ELECTRIC PUBLIC UTILITIES COMPANY
v.
PUBLIC SERVICE COMMISSION et al.**

Consolidation, merger, and sale — Evidence of excessive purchase price.

1. Alleged gross overcapitalization in the proposed purchase of controlling stock of operating companies by a holding company was held not to be established affirmatively by mere difference of opinion of experts as to the relative weight of various factors in valuation, where the possibility of increased revenue from rural electrification might explain such variation of opinion, p. 858.

Consolidation, merger, and sale — Excessive purchase price — Commission jurisdiction over rates and service.

2. Consolidation of public utility corporations cannot be denied by the Commission on the grounds of overcapitalization or excessive purchase price for controlling stock as being detrimental to public interest, in view of the complete jurisdiction of the Commission both as to rates and services of the operating company, p. 862.

Commissions — Power over managerial questions.

Statement that we have no such paternalism in government which undertakes to substitute the Public Service Commission as the board of directors of private business enterprises even of a quasipublic character, or of those charged with a public interest, p. 858.

[October 30, 1928.]

APPEAL from order of the Commission denying authority of a holding company to purchase controlling interest of four operating electric companies because of alleged detriment to public interest; appeal sustained and case remanded to the Commission for further proceedings in accordance with opinion.

Appearances: Miles & Edgett and Maloy, Brady & Yost, for petitioners; Raymond S. Williams, Acting General Counsel, for Public Service Commission.

P.U.R.1928E.

O'Dunne, J. (sitting as of Circuit Court No. 2): One O'Hara owned all the stock of four electric companies involved in this application. He sold the entire stock of the four companies to representatives of the petitioner (which is an electric company in the form of a holding company) for the sum of \$468,000, subject to the \$50,000 of mortgages outstanding on the said companies. The purchase price has been paid O'Hara. When the certificates of stock were sought to be transferred to the petitioner (Electric Company Holding Company) it was surprised to learn that *consent to the transfer* had to be first had by the Public Service Commission of Maryland, and it then formally made application for such consent.

On the first hearing before the Commission it was refused; ground assigned was that it had not been shown to be in the public interest. Appeal was prosecuted by the petitioner to the Circuit Court No. 2, which sustained the Commission. On appeal to the court of appeals this was reversed. (Opinion by Adkins, J., Daily Record, February 18, 1928.)

Said our court of appeals (P.U.R.1928C, 3, 11, 140 Atl. 840) (referring to the Public Service Commission):

"It is not their province to insist that the public shall be *benefited*, as a condition to the change of ownership, but their duty is to see that no such change shall be made as would work to the *public detriment*."

Whereupon the cause was remanded to the Public Service Commission by the court of appeals for further proceedings.

Whereupon the Public Service Commission went through the form of "further proceedings" and adopted the formulae prescribed by the court of appeals, and in its order of April 26, 1928, said that the application of the four companies named, to transfer the certificates of their capital stock to the petitioner, which has agreed to pledge the said stock under a trust agreement with the Guaranty Trust Company of New York to secure collateral gold bonds to be issued thereunder, "*would be detrimental to the public interest*" and, therefore, denied and dismissed the petition.

From that order appeal is prosecuted to the circuit court No. 2 and by request of counsel and consent of chancellor presiding P.U.R.1928E.

in circuit court No. 2, submitted in summer recess to this circuit court.

Examining the record, and referring as briefly as possible to the facts and to the law, so as not to unduly prolong this opinion, the situation seems to be based on a difference of opinion among engineering experts as to the valuation of the said four electric light properties, and also to some difference of opinion among experts as to the various factors which enter into the somewhat complicated question of valuation of properties and the proportionate weight to be given *each* of the several factors. The result being as follows: The chief engineer of the Commission summarizes his findings on value as follows:

"It is my opinion that the combined properties of these four companies, including all tangible and intangible values, and *neglecting any capitalization of earning power*, were worth under date of December 31, 1927, for *sale purposes*, \$315,750."

"I might say that I arrived at that figure by consideration of the present cost of reproduction new less depreciation, by some consideration of the original costs, and what I think to be a fair, sound value of the properties for sale purposes."

It seems apparent from the testimony of Mr. Wolf, chief engineer of the Commission, in the original hearing, that he draws no sharp distinction between valuations computed for rate-making purposes and for sale of securities, but on page 73 of present record says vaguely, it is true, that he has given the companies the benefit of the doubt as to certain property which "wouldn't be used and useful, but would be transferred."

Contrasted with his expert opinion on valuation, computed on such basis, and for sale purposes, is the conclusion of engineers Day and Zimmerman, admittedly outstanding engineers of high repute.

Their valuation is \$468,000, subject to the \$50,000 outstanding bond issue, or a total of \$518,000.

Chairman West, of Public Service Commission, to Mr. Nodder, chief auditor of the Commission (this record, p. 101):

"Chairman: One moment, Mr. Nodder. You have got here the net income of these four companies, \$31,647.21.

"Witness (Mr. Nodder): 'Yes, sir.'

P.U.R.1928E.

"Chairman: 'What return would that be on the price the company proposes to pay for these properties including the assumption of \$50,000 bond issue which figures \$518,000?'

"Witness: 'Mr. West, that would be based on the amount of net operating income shown about five or six lines above, \$36,785. I can give you that figure readily. That would be just a little over 7 per cent. That's at present rates. That's 1927 earnings.'"

Mr. Martz, who made the appraisal for the petitioners, on behalf of firm of Day & Zimmerman, engineers, on page 128, present record, says:

"We took the gross earnings of this company for the year ending December 31, 1926, and deducted from that 5 per cent for depreciation and capitalized the remainder, and that gave us a value of \$600,000, on the basis of actual earnings of the company for 1926."

Commissioner Harper: "Did that indicate to your mind that the rates might have been a little high?"

The Witness: "Now that's the first consideration we have. Are these rates too high, because certainly we cannot say whether the rates are reasonable. You only can say whether the rates are reasonable, and, therefore, we cannot put ourselves in your position, but the only tests we have of that is what are the rates for comparable service in the general vicinity in which the properties happen to be located, or in general what's our experience elsewhere throughout the country, but more particularly in the particular territory in which the properties are located."

"Now we find that the rates on these properties, the top lighting rates, which is a large measure of what the rates really are, are 10 cents, 9 cents, 11.4 cents and 11.4 cents. Those rates are not out of line with the rates for comparable service of the Potomac Edison Company, their rural service, which applies in that territory down there, and presumably would apply in these small towns if they had these properties, which I understand are 9.6 cents, their top rate for their lighting service."

"We, looking at that and considering the fact that a 9 and 10-cent rate is not high for that class of service, felt that these rates were certainly not very much out of line from that stand-P.U.R.1928E.

point, but with those rates they were able to earn on our basis on a capitalized value of \$600,000. We discounted that to the extent of \$100,000, bringing that down to \$500,000.

"In doing that we felt that the company might have to make even further concessions in those rates. I am trying to frankly tell you what our considerations were in coming into this thing from the outside without prejudice.

(A rate investigation is then ordered and said to be still pending.) Full details of each engineer's analysis are set forth in elaborate exhibits.

A basic fact in this case still remains and must not be lost sight of.

We have no such paternalism in government which undertakes to substitute the Public Service Commission as the board of directors of private business enterprises even of a quasi-public character, or of those charged with a public interest. Commissions are at best the legislature's sentinels posted in the public interest to prevent manifest public detriment, but it was never intended that private property, and such freedom to contract as still exists, and those rights which go under the general caption of "pursuit of happiness," for the protection of which governments were ordained, should be subject to the administrative whims of legislative agencies ordained clearly for the protection of public interest, against manifest public detriment. There is a growing tendency among administrative boards and zoning commissions in the too sincere and zealous administration of their public functions, to assume there is committed to their delicate administrative discretion, the "general welfare" of government which can be best promoted solely by a rigid adherence to the laws of the land amply elastic for the protection of life, liberty and property, according to anciently established, and long continued, firmly recognized and adequately applied in the legal forums of the courts, with that sacred safeguard of the rights of one and all, by appeal to the court of last resort, to which all bow with the utmost confidence in its final arbitrament of all matters legal.

[1] The other fact which must not be lost sight of is that this is not an application to *issue bonds*, or local securities, to the in-

P.U.R.1928E.

vesting public, based on a *definite valuation of these properties, at the fixed figure of \$518,000*, but is an application of a person (though a corporate person) who has bought the total stock certificates of these four companies for the sum of \$468,000 (subject to \$50,000 still carried as a lien on the properties) and which petitioner has contracted to deposit them, along with other collateral, aggregating some \$7,000,000, of which this is rated in the whole on the basis of \$518,000, the deposit to be made with the Guaranty Trust Company of New York, at New York, against which total collateral of some \$7,000,000 said trust company is to issue \$4,000,000 of its bonds. Therefore, there is, or there may be, room for some difference of opinion among experts, depending on various standards for computation, and the difference of opinion as to future possibilities for increasing the sale of kilowatt hours by further educating a rural community to the advantages and convenience of electric current for pumping of water on the farm by electric motor against the hand-drawn "old oaken bucket" or the windmill; or the electric washing machine against the scrubbing board back breaker; or whether the winter wood can more efficiently be sawed by electric motor than by a leather belt attached to the farm flivver; whether lawn mowers, run by an electric cord, are more adapted to the use of the tired farmer than pushing the old style hand mower after the day's work. On all such questions an optimistic and forward looking electric company may well be willing to hazard an investment, which, to a more conservative or backward looking mind, may seem unwarranted by the past history of a rural community. We are living in an age of progress. The "Graf Zeppelin" is now seeking \$14,000,000 for investment in transatlantic Zeppelins. Who is wise enough to predict that such investment based on advanced transportation thought will be detrimental to the public good, in view of the wonders of air craftsmanship, with the radio dethroning the hitherto undisputed dominion of the press in the field of daily transmission of current thought. The movies and the vitaphone are supplanting the so-called "legitimate drama." The Frigidaire and Kelvinator are rapidly scrapping the ice plants. The horse is disappearing with the advent of the tractor. The railroads are in a life and death

P.U.R.1928E.

struggle with the truck and motor bus companies, both keeping one eye on aerial navigation. Who can say whether and when electric current may settle the "annual spring coal strikes," or when the frigidaire system will end the summer exodus problem. Science and time alone can tell.

Returning from the realm of speculation to the bed rock of realities, what are the jurisdictional facts upon which the Public Commission has couched its denial of statutory consent, in the *formula* cast for it by the court of appeals? "Prejudicial to the public interest" is predicated on the difference of engineering experts in their valuation of values between \$315,750 and \$518,000. The first full and complete answer, as it seems to me, is this. Assuming for argument that \$315,000 is a fair valuation for sale purposes as computed by the Commission's engineer, and that \$518,000 is an optimistic purchase price based on the purchaser's confidence in the intelligence of that rural community, in which these companies are located, and on its own ability to *educate* that intelligence, resulting in the extension of the sale of kilowatt hours by a more diversified use on the farm and in hamlet of modern labor and time saving devices, it is not proposed to issue bonds *on these companies*, *on that valuation*, but merely to transfer certificates of stock holdings, as part of general collateral of \$7,000,000 (of which it forms \$518,000) against a New York Trust Company bond issue there of \$4,000,000 against the total collateral, thus deposited with it the rest of which collateral has been approved in the various states where the several holdings lie, and over which the Public Service Commission of Maryland has not even asserted jurisdiction. Even assuming that the "investing public" is one of the subject matters over which the Maryland Commission may, under proper conditions, assert jurisdiction, where shown to be detrimental to the public interest, is not such jurisdiction *limited* to those cases where a corporation created by, or operating in, Maryland, is offering to issue *its* securities *on its property* on valuations over which the Commission should in such cases exercise a wise control and some administrative discretion on behalf of the investing public here. But if the Guaranty Trust Company of New York (hard-headed bankers as we may assume they are) are satisfied with the value of the collateral irrespective of any possible dif-

ference there may be in the economic soundness on either side of the variation of expert opinion expressed with due allowance for the standards used by the experts in arriving at somewhat different conclusions on the values of these four electric properties, the possible difference of some \$200,000 in \$7,000,000 collateral, is not going to affect the intrinsic value of the \$4,000,000 bond issue there made *on the sum total* of the collateral pledged.

What is the evidence in this record of the "public detriment," assuming for the sake of argument that there is an overvaluation, and that the Commission's engineer is correct, and the purchaser's engineers are wrong?

The testimony is all gotten from two witnesses, Mr. Emory L. Coblenz and Mr. R. Paul Smith. Both of them admittedly credible and reliable witnesses. Both of them officers, and executive officers, of the Potomac Edison Electric Company operating in that locality, and which company is protesting this sale, and itself *wants to buy all of these four properties*, and believes it ought to have them, and asserts they are worth more to it than to anyone else (record, p. 52), and that said company stands ready and willing to buy at any time, at any price the Public Service Commission will approve and which will be fixed by any reliable engineers, and Mr. Coblenz frankly admits that Day & Zimmerman are engineers of "outstanding reputation," though never employed by his electric company (The Potomac Edison Company). Some force is sought to be made of the fact that Mr. Coblenz, when pressed by counsel for Public Service Commission would not say that his company would be willing to buy the properties for \$468,000 subject to the outstanding \$50,000 bond issue. Can even the business or commercial sense of the judicial mind (not thought by some to be generally very intense), be blind to the fact that a company desiring to buy, and hoping to be able to buy if this nonconsent of the Commission to the transfer of stock certificates can be successfully upheld, does not hereafter want to be confronted with or estopped by an expressed consent to a purchase price, if it should be fortunate enough later in strategic manoeuvre to "dicker" for the acquisition of these four properties?

Is my statement above warranted in this record that the Potomac Edison Company is a *protestant* against this sale or P.U.R.1928E.

transfer to the petitioner, in view of the testimony in the record by Mr. Smith, vice-president of said company, that they are not *protestants?* They are *in fact*, but not *in form*. They claim to be advised by counsel that technically they are not so in form and do not appeal in such official capacity, whether this technical interpretation is correct, is wholly beside the question. *That they are so in fact* can hardly be disputed.

Here is the legal fiction in the record on which the judicial formula, molded for the Commission by the court of appeals, is accepted, adopted, and executed.

Coblentz (record, p. 34) :

"Obviously when securities are issued against properties at an inflated value, why the investing public is, to that extent injured." (But he does not profess to know the values of *these four properties.*)

"When there is a case of gross overcapitalization of a utility, requiring the payment of a fixed charge of this overcapitalization, there is an undoubted tendency on the part of any operator, I don't care who he is, of a property, in order to meet the inevitable fixed charge that is ahead of him or before him, to cut out, as far as possible, those things in the operation of a company which may not, for the time being, seem absolutely necessary, but which is a great contributing factor to the general service rendered to the public, and to that extent it affects the service to the public beyond a question." (Italics by the Court.)

R. Paul Smith (vice-president of the same company), when later testifying, adopts substantially the same thought as previously expressed by Mr. Coblentz, the chairman of the board of directors of his company.

It seems to me there are two answers to this testimony:

1. (a) That it is predicated on *gross overcapitalization*.
- (b) Where securities are issued *against said gross overcapitalization* and thereby become a *fixed charge* against the company —neither of which is shown by this record;

[2] 2. That a complete answer to both, even if shown to exist, is that both rate and service are matters under the jurisdiction of the Commission, and that neither can the rate be increased nor the service diminished or impaired, *but by its assent*, and that,
P.U.R.1928E.

therefore, in neither case could it have the effect contended for, even if the factors alleged were present, *actively operating*, as an incentive to one or the other, or both.

Therefore, it seems to me the action of the Public Service Commission, in its order of April 26, 1928, is but the *verbal* adoption of a formula, *without substance of evidence to sustain it*, and therefore, in the technical language of the law is what is known as "unreasonable" and "arbitrary," without meaning to use either of the legal terms in any *personal or offensive sense*. Sometimes the law uses the term "fraud" when it has reference to the fiction known as "constructive fraud," begotten of a confidential relationship, and where it *imputes* legal or constructive fraud to parties, as a matter of public policy, even when they feel they have acted in perfect good faith, but without due regard for some of the legal requirements as recognized and required by judicial tribunals.

Wherefore, this cause is again remanded to the Public Service Commission of Maryland, this Court having no authority or jurisdiction to direct the consent necessary for such transfer of stock certificates.

MASSACHUSETTS DEPARTMENT OF PUBLIC UTILITIES.

RE NEW YORK, NEW HAVEN & HARTFORD RAIL-
ROAD COMPANY.

[D. P. U. 3343.]

Street railways — Zoning restrictions — Property not used in utility service.

Railroad properties to be leased to private business concerns were held not to be within a provision of a zoning act exempting from zoning restrictions property of a public service corporation necessary for public convenience and welfare.

[October 26, 1928.]

PETITION by a railroad for exemption from the operation of a city zoning act on certain property; petition dismissed.

By the Department: This is a petition of the New York, New Haven & Hartford Railroad Company requesting the Department to exempt certain land owned by it from the operation P.U.R.1928E.

of the provisions of Stats. 1924, Chap. 488, as amended, known as the "Boston Zoning Act."

A public hearing was held, of which due notice was given and at which the railroad and the remonstrants were heard. Statutes 1924, Chap 488, § 22, reads in part—

"A building or premises *used or to be used by a public service corporation* may be exempted from the operation of this act if, upon a petition of the corporation, the Department of Public Utilities shall, after a public hearing, decide that the present or proposed situation of the building or premises in question is reasonably necessary for the convenience or welfare of the public."

It appeared in evidence that the railroad owned the land sought to be exempted and leased a certain portion of it to a private business concern and proposed to lease the balance to other private parties. Counsel for the railroad stated at the hearing that the use of the land "is in a sense a railroad use. It is for a customer of the railroad, but it is a use which will help the customer to the extent of saving him storage of these materials or construction of a warehouse or storage place. It is more to the advantage of the railroad customers than it is to the advantage of the railroad, but the railroad if it cannot do this sort of thing, is, of course, deprived of a certain use or value from its own property." He further stated that "we want permission to protect our lessees or permission to lease it to lessees for this purpose."

We are of the opinion that the use which confers jurisdiction upon this Department to act must be a use by the public service corporation itself and in the course of its business as such corporation. The land in question is being used and is to be used by lessees of the railroad for their own purposes and not for the railroad's business. We believe such use is not the one referred to or contemplated by the statute and that we, therefore, have no jurisdiction in the matter. Because of this, it is unnecessary for us to consider the question whether the proposed situation of the premises is reasonably necessary for the convenience or welfare of the public, and we do not pass upon that issue. Accordingly, the petition is dismissed, and it is so ordered.

P.U.R.1928E.

INDEX.

ABANDONED PROPERTY.

Allowance for amortization of gas generating plant rendered nonoperative by substitution of natural gas supply, see RETURN, 4, 5.
Valuation of tangible property generally, see VALUATION, 42-48.

ABANDONMENT OF SERVICE.

Judicial notice by Commission of location of certain city streets and of traffic conditions in petition for authority to abandon street car lines, see COMMISSIONS, 4.

Authority to purchaser of portion of railroad to junk and remove ties, tracks, bridges, and other equipment, see RAILROADS, 2.

Commission jurisdiction over abandonment of service, see SERVICE, 2, 4, 5, 7.

Abandonment and discontinuance of service generally, see SERVICE, 18-30.

ABILITY TO PAY.

Ability to pay as affecting reasonableness of rates, see RATES, 16.

ACCOUNTING.

Irregularities in bookkeeping as a factor in determining depreciation, see DEPRECIATION, 2.

Admissibility of audit covering telephone operation in rate investigation, see EVIDENCE, 6-8.

Purchase price of controlling stock as a charge to capital, see VALUATION, 41.

1. Spare parts of various equipment for a street railway company held ready to install in case of breakdowns should be included in the plant account as stand-by equipment, rather than being carried as part of materials and supplies. Re United R. Co. (Mo.) 419.

ACCRUED DEPRECIATION.

Determination of accrued depreciation, see DEPRECIATION, 13-15.

Deduction of depreciation in valuation proceedings, see VALUATION, 17-19.

ADJOINING PROPERTY.

Assessments of adjoining properties as affecting valuation of street railway right of ways, see VALUATION, 72-74.

AGREEMENTS.

Granting of motion for rehearing of telephone rate proceeding where rates had been fixed by agreed valuation without actual estimate, see **VALUATION**, 2.

AMORTIZATION.

Allowance for amortization of gas generating plant rendered nonoperative by substitution of natural gas supply, see **RETURN**, 4.

ANNUAL DEPRECIATION.

See **DEPRECIATION**.

APPEAL AND REVIEW.

Federal constitutionality of state statute as not necessarily to be tested in lower Federal Court in view of review in state court where appeal to Supreme Court of United States is provided, see **CONSTITUTIONAL LAW**, 8.

1. Evidence examined, and found sufficient to sustain the findings and order of the State Railway Commission as to conditions involved, the rate established, and the necessity for the service sought. Farmers' & Merchants' Teleph. Co. v. Orleans Community Club (Neb. Sup. Ct.) 787.

2. An order of the Board fixing the amount of compensation to be paid for switching service between telephone companies will be held justified unless there is evidence to show that the expense of rendering such service will be increased by an amount in excess of the provided compensation. Southwest Branch of Rural Reciprocal Teleph. Co. v. Dakota Central Teleph. Co. (S. D. Sup. Ct.) 757.

3. An estimate prepared by company experts and officers on the value of its property should not be permitted to disturb a valuation fixed by State Commissions made after a hearing on the same cause unless the court is satisfied that the Commission's estimate is based upon some fundamental error of fact or of law. Cambridge Electric Light Co. v. Atwill (U. S. Dist. Ct.) 253.

APPLICANTS.

Preference between applicants on granting certificate for motor service, see **CERTIFICATES OF CONVENIENCE AND NECESSITY**, 5, 6.

APPORTIONMENT.

Commission jurisdiction over apportionment of expense of physical connection, see **COMMISSIONS**, 20.

Apportionment of cost of eliminating crossings, see **CROSSINGS**, 2.

1. An allocation of a particular exchange as a separate entity instead of a part of a general telephone system was held to be inaccurate where the other exchanges, not isolated and bearing a direct relation to each other, were all located in the same county. Re Logansport Home Teleph. Co. (Ind.) 714.

P.U.R.1928E.

APPORTIONMENT—*continued.*

2. The additional expense of supplying water to a county farm was directed to be apportioned in computing the cost of operating a booster pump supplying an elevated city reservoir where such pump also supplied the farm. *Lee's Summit v. Independence Water Works Co.* (Mo.) 184.

3. A local telephone company complaining against the adequacy of a toll apportionment according to an arrangement between local and long distance companies which had been in effect throughout the state in excess of twelve years was held to have the burden of proving that such basis for compensation was unjust, unfair, or unreasonable in view of the character of service rendered. *Re Oklahoma-Arkansas Teleph. Co.* (Okla.) 737.

4. Collateral expenses incidental to the handling of long distance calls such as toll checking and line testing service by local companies should be settled by independent agreement between the local and long distance companies, and should not be confused in the apportionment of compensation between the companies for the actual transmission of such calls through the respective exchanges. *Re Oklahoma-Arkansas Teleph. Co.* (Okla.) 737.

5. The proper method to determine the cost of handling toll calls as between a long distance and a local telephone company (also owning long distance lines) is to base the compensation on the cost of handling the whole toll business by the proper exchange, regardless of whose line it went over, rather than to separate the cost of handling tolls over the respective lines of the two companies. *Re Oklahoma-Arkansas Teleph. Co.* (Okla.) 737.

6. A so-called "two station" method of estimating the cost of handling toll calls on the basis of the use of telephone facilities from one local station to another was held to be more suitable than a "one station" method contemplating the service rendered through the use of one station to the toll board and from the toll board to the toll line. *Re Oklahoma-Arkansas Teleph. Co.* (Okla.) 737.

7. Long distance or toll line business was not permitted to be separated from local exchange business in computing gross revenues for a rate-making proceeding, where the exchange service over long distance lines was of far greater value than that rendered by toll lines, and where the company gained by treating both operations as a unit. *Re Rock Hill Teleph. Co.* (S. C.) 221.

8. Estimates of the cost of operating telephone switching service based on studies confined to periods of greatest expense under conditions not entirely chargeable to such operations were held not to be of sufficient weight to show that an order of the Board fixing a less amount for compensation than such cost appraisal was unreasonable. *Southwest Branch of Rural Reciprocal Teleph. Co. v. Dakota Central Teleph. Co.* (S. D. Sup. Ct.) 757.

9. Allocation was made of the cost of distributing water to various classes of service by including all of the facilities used directly or indirectly in supplying water to any particular class of service. *Department of Public Works ex rel. Asotin v. Pacific Power & Light Co.* (Wash.) 213.

10. Allocation of plant as between various classes of water service was made on a consumption basis rather than the usual demand basis. *Depart-P.U.R.1928E.*

APPORTIONMENT—*continued.*

ment of Public Works ex rel. Asotin v. Pacific Power & Light Co. (Wash.) 213.

11. An apportionment of the operating cost and plant investment by a utility between its gas and electric departments respectively, which had been accepted as the proper basis by the Commission without objection in the annual reports of the company, was held to be the proper basis for computing the production cost of gas alone, where no specific instances of erroneous apportionment were shown. Queens Borough Gas & E. Co. v. Prendergast (U. S. Dist. Ct.) 791.

12. A contention that a gas company operating in more than one county could not attack as confiscatory, a statute regulating the maximum to be charged in one county because of failure of the company to allocate the plant investment and production cost in the county to which the statute applied, as opposed to such figures for its general business, was overruled where the physical segregation of the company's plant with respect to each county was impossible, and where a theoretical allocation of costs and values would be impracticable, and where the margin of confiscation was so great that no defensible allocation of costs and values between the two counties could change the result. Queens Borough Gas & E. Co. v. Prendergast (U. S. Dist. Ct.) 791.

AUTOMOBILES.

Constitutionality of delegation of power to State Commissions to regulate automobile carriers, see CONSTITUTIONAL LAW, 4, 5.

Payment of fine to secretary of Commission in lieu of suspension of certificate, see FINES AND PENALTIES, 1.

Denial of injunctive relief against Commission refusing to authorize interstate motor carriers, see INJUNCTION, 2.

Competition between motor carrier companies, see MONOPOLY AND COMPETITION.

Free transfer provision as not properly before Commission in proceeding relating to changes in existing route and transfer arrangements between bus and traction lines, see PROCEDURE, 1.

What constitutes a public utility generally, see PUBLIC UTILITIES.

Substitution of motor vehicles for railroad service, see SERVICE, 31, 32.

Automobile service generally, see SERVICE, 37-39.

Annotation on automobiles generally, p. 551.

Annotation on automobile regulation by municipalities, p. 552.

Annotation on regulation of automobile service by Commission, p. 552.

Annotation on automobile insurance, p. 553.

Dissent to the effect that the Commission by virtue of its general powers to "regulate" the service and safety of operation of each motor transportation company and by virtue of its constitutional powers to regulate common carriers, has jurisdiction to refuse authority for proposed motor service which will result in a duplication detrimental to public interest, p. 101.

Discussion of the right of railroads or their subsidiaries to engage in P.U.R. 1928E.

AUTOMOBILES--continued.

the operation of motor vehicles for hire in the absence of express statutory authority, p. 544.

1. Railroad companies have as much right as any other companies or individuals to operate motor vehicles for hire where the statutes regulating such motor utilities show no purpose on the part of the legislature to exclude railroad companies or their subsidiaries. *Re Central of Georgia Motor Transport Co.* (Ala.) 535.

2. The question of whether a railroad or its subsidiary should be authorized to operate as a motor carrier over the public highways of the state must be determined by the facts of each case. *Re Central of Georgia Motor Transport Co.* (Ala.) 535.

3. A traction company was not permitted to establish a permanent feeder bus system out of a special equipment fund where there was doubt as to the charter powers of the company to engage in both operations, and where its franchises had already expired, thereby creating a new problem, the solution of which would be complicated by permitting local transportation agencies to engage in new types of service. *Central Northwest Business Men's Assn. v. Chicago Surface Lines* (Ill.) 685.

4. The Commission has no authority in the absence of a statute specifically delegating to it power to regulate motor utilities to refuse authority to intrastate operator seeking the same, notwithstanding the fact that existing motor service over the proposed route is adequate and that the proposed service will make both operations unprofitable. *Re S. Y. A. Bus Line* (Neb.) 98.

AVIATION

Necessity of granting certificate for interstate airplane service upon condition of compliance with state regulations, see **CERTIFICATES OF CONVENIENCE AND NECESSITY**, 3.

Electric rates for airway beacons, see **RATES**, 27.

BANKRUPTCY.

Stay of proceedings in state court against utility pending determination in Federal Court of petition for voluntary bankruptcy as automatically ineffective and properly vacated upon dismissal of bankruptcy petition, see **INJUNCTION**, 1.

Status of electric railway under Bankruptcy Act, see **RAILROADS**, 5.

1. To attempt to wind up with the summary methods contemplated in bankruptcy proceedings, the affairs of a street railway company would cause great financial loss to creditors and serious embarrassment and inconvenience to the public, owing to the discontinuance of service, and such corporations should, therefore, not be permitted to avoid their obligations through the Bankruptcy Act. *Columbia R. Gas & E. Co. v. South Carolina* (U. S. C. C. A.) 235.

2. A street railway company is a railroad within the meaning of the Federal Bankruptcy Act prohibiting railroad corporations from being adjudicated bankrupt. *Columbia R. Gas & E. Co. v. South Carolina* (U. S. C. C. A.) 235.
P.U.R. 1928E.

BANKRUPTCY—*continued.*

3. The voluntary discontinuance of a street railway company prior to the initiation of proceedings in Federal Bankruptcy Court was held not to change the status of the utility in such a manner as to entitle it to become a bankrupt notwithstanding the prohibition against such companies availing themselves of the provisions of the Bankruptcy Act. *Columbia R. Gas & E. Co. v. South Carolina* (U. S. C. C. A.) 235.

BEACONS.

Electric rates for airway beacons, see **RATES**, 27.

BILLING.

Billing on basis of check meter readings where service has been tampered with in the past, see **PAYMENT**, 1.

BOATS.

Allowance for depreciation of various utilities, see **DEPRECIATION**, 16-26.
Duty to inform Commission of departure from schedule, see **DISCRIMINATION**, 1.

Showing that land in area served by vessels has been farmed in relatively small tracts and that tonnage is broken into small consignments requiring frequent handling as pertinent in rate proceeding, see **RATES**, 10.

Application of statute granting Commission power to prescribe uniform rates, see **RATES**, 11, 12.

BOND DISCOUNT.

Treatment of financing costs in valuation, see **VALUATION**, 37-40.

BONDS.

See **SECURITY ISSUES**.

BOOK COST.

Percentage of book cost allowed for depreciation of telephone property, see **DEPRECIATION**, 20.

BROKERAGE.

Treatment of financing costs in valuation, see **VALUATION**, 37-40.

BUSINESS.

Rate reduction to stimulate business, see **RATES**, 17.

CALLS.

Record of unanswered calls, see **SERVICE**, 45.

CAPITAL.

Miscellaneous charges to capital, see **VALUATION**, 41.
P.U.R.1928E.

CARRIERS.

Competition between carriers, see **MONOPOLY AND COMPETITION**.
What constitutes a public utility generally, see **PUBLIC UTILITIES**.

CARS.

Adequacy and safety of one-man cars on cross-town lines, see **SERVICE**, 42.

CERTIFICATES OF CONVENIENCE AND NECESSITY.**I. In general, 1-13.****II. Jurisdiction and powers of Commissions, 14-16.****I. In general.**

Certificates for operation of automobile service by railroad, see **AUTOMOBILES**, 1, 2.

Payment of fine to secretary of Commission in lieu of suspension of certificate, see **FINES AND PENALTIES**, 1.

Franchise as inoperative until certificate is granted by Commission, see **FRANCHISES**, 1.

Certificates for competitive service, see **MONOPOLY AND COMPETITION**.

Annotation on operation prior to regulation, p. 133.

Annotation on when certificate is required, p. 133.

Annotation on consent of local authorities, p. 134.

Annotation on reasons for granting or refusing, p. 134.

Annotation on applicant's personal qualifications, p. 135.

Annotation on evidence of necessity, p. 136.

Annotation on preferences between applicants, p. 136.

Annotation on conditions of granting certificate, p. 137.

Annotation on revocation and amendment of certificate, p. 137.

Annotation on sales, transfers, and assignments of certificates, p. 137.

Annotation on procedure on securing certificate, p. 139.

Review of decisions holding that existing utilities should be granted certificates of convenience and necessity in preference to independent operators, p. 505.

1. The Commission has the power, after hearing, to issue a certificate of convenience and necessity to a railroad company or its subsidiary for the operation of motor vehicles where a statute providing for such procedure does not exclude such company. *Re Central of Georgia Motor Transport Co. (Ala.) 535.*

2. Authority was given to a utility to exercise franchise powers given in an ordinance, which also specified rates to be charged, upon condition that the utility waived any rights to charge such rates, without the approval of the Commission. *Re Arvada Electric Co. (Colo.) 471.*

3. An application for a certificate of convenience and necessity for the transportation of passengers and express by airplanes in interstate commerce must be granted, upon condition of compliance with state regulations, without determining the question of public need, in view of the Interstate P.U.R.1928E.

CERTIFICATES OF CONVENIENCE AND NECESSITY—*continued.*

Commerce Clause of the Federal Constitution and the laws of the state. Re U. S. Airways (Colo.) 518.

4. The fact that a motor coach line would aid materially in the development of a territory which had been retarded by the lack of transportation facilities and was recently subdivided was taken into consideration in determining the necessity for such a route. Re Chicago & J. Transp. Co. (Ill.) 481.

5. Certificates for operation of bus routes were granted to companies incorporated by existing rail carriers in an effort to protect the latter from independent competition as long as they should be willing and able to give needed public service, in view of the added facilities possible for such motor service that could not be furnished by independent companies. Re Chicago & J. Transp. Co. (Ill.) 481.

6. Certificates for bus operation were granted to subsidiaries of existing rail carriers where experienced employees, stations, storage, baggage transfer, telegraph, and commercial telephone lines were all available to an extent that would be prohibitive for an independent bus line to furnish and where such equipment was necessary for economical and efficient automotive service. Re Chicago & J. Transp. Co. (Ill.) 481.

7. Evidence of financial ability to operate a motor coach line over proposed territory is insufficient to warrant the grant of a certificate. Re Chicago & J. Transp. Co. (Ill.) 481.

8. Certificates to operate bus routes were not withheld from the subsidiary of a railroad incorporated by the receiver of the latter upon order of the Federal District Court, notwithstanding a contention that the company was acting *ultra vires* in attempting to operate busses. Re Chicago & J. Transp. Co. (Ill.) 481.

9. The Commission is not justified in issuing an order permitting an electric company to enter and serve competitive territory in a proceeding in which complaint is made against rates of the existing utility where the company has on record no application for a certificate of such authority but merely an informal letter offering certain rates if permitted to serve. Makin v. Missouri Pub. Service Commission (Mo.) 290.

10. The Commission will not grant authority to do that which has already been done, such as construction and operation of parts of a proposed gas distribution plant, previous to the request for authority, although such error of the applicant will not be permitted to jeopardize the interest of the people and cities already served. Re Shippey, Maddin & P. Gas Co. (Mo.) 691.

11. The Commission will not undertake to grant certificates of convenience and necessity to construct or operate a gas transmission system in any town or city which has not voted a franchise authorizing such business within its boundaries. Re Shippey, Maddin & P. Gas Co. (Mo.) 691.

12. A transportation company agreeing to pick up and deliver freight through the agency of hired owners of automobile equipment and purporting to restrict its activities to a selected type of shipping business was held to be engaged in evasion of a statute requiring motor utilities using the highways to obtain a certificate of convenience and necessity, to pay taxes P.U.R.1928E.

CERTIFICATES OF CONVENIENCE AND NECESSITY—*continued*.
for the use thereof and to become subject to the regulation of the Commission. Northern Ohio Power & Light Co. v. Motor Freight (Ohio) 609.

13. The failure of a motor transportation company to comply with the provisions of law or the rules and regulations prescribed by the Public Utilities Commission for the safety of the traveling public warrants the revocation of its certificate of public convenience and necessity. Minerva-Canton Transit Co. v. Public Utilities Commission (Ohio Sup. Ct.) 130.

II. Jurisdiction and powers of Commissions.

Lack of Commission power to refuse authority to intrastate operator seeking certificate, see AUTOMOBILES, 4.

Determination of charter rights of corporation applying for certificate as a judicial question not within Commission jurisdiction, see COMMISSIONS, 3.

14. The Commission has jurisdiction to issue a preliminary order in the event that a public utility desires to exercise the right or privilege under a franchise or ordinance which it contemplates securing but which has not as yet been granted. Re Public Service Co. (Colo.) 778.

15. It is the power and duty of the Commission in determining whether or not a certificate should be granted authorizing the exercise of rights under a franchise in possession of the purchaser of a public utility, to safeguard the public interest by preventing such utility from getting into a position where it might claim to have the right to earn a return on an unreasonable and excessive purchase price. Re Public Service Co. (Colo.) 778.

16. The Public Utilities Commission is authorized by law, "for a good cause," to revoke a certificate of public convenience and necessity theretofore issued by it to any motor transportation company. Minerva-Canton Transit Co. v. Public Utilities Commission (Ohio Sup. Ct.) 130.

CHARTERS.

Determination of charter rights of corporation applying for certificate as a judicial question not within Commission jurisdiction, see COMMISSIONS, 3.

CHECK METERS.

Billing on basis of check meter readings where service has been tampered with in the past, see PAYMENT, 1.

COLORADO.

Lack of Commission jurisdiction to approve contract between companies relating to purchase and sale of property, see CONSOLIDATION, MERGER, AND SALE, 2.

COMMISSIONS.

Conclusiveness of Commission findings on appeal, see APPEAL AND REVIEW.

P.U.R.1928E.

INDEX.

COMMISSIONS—*continued.*

- Lack of Commission power to refuse authority to intrastate operator seeking certificate, see AUTOMOBILES, 4.
- Lack of Commission jurisdiction to approve contract between companies relating to purchase and sale of property, see CONSOLIDATION, MERGER, AND SALE, 2.
- Notice of hearing in compliance with constitutional requirements, see CONSTITUTIONAL LAW, 2.
- Constitutionality of delegation of power to State Commissions to regulate automobile carriers, see CONSTITUTIONAL LAW, 4, 5.
- Trial by Federal judge where temporary injunction against Commission has been granted by statutory Federal Court of three judges, see COURTS, 1.
- Lack of Federal Court jurisdiction over State Commission in intrastate field, see COURTS, 2.
- Commission jurisdiction over apportionment of crossing expense, see CROSSINGS, 2.
- Evidence on complaint against discontinuance of spur track without Commission authority, see EVIDENCE, 1.
- Injunction against Commission order generally, see INJUNCTION.
- Force of Commission order recognizing existence of free telephone service between certain points, see ORDERS, 1.
- Power of Commission to determine when and where service in transit shall be rendered by railroad, see RAILROADS, 4.
- Jurisdiction, powers, and duties with respect to rates, see RATES, 4-8.
- Constitutional provision reserving to State Commission control over rates as divesting municipalities of powers previously exercised, see RATES, 9.
- Necessity of filing schedules with Commission, see RATES, 22.
- Commission jurisdiction over reparation, see REPARATION, 1, 2.
- Treatment of expense of rate cases, see RETURN, 7, 9, 10.
- Jurisdiction and powers over service, see SERVICE, 1-7.
- Treatment of financing costs in valuation, see VALUATION, 37-40.
- Annotation on general powers and duties of Commission, p. 532.
- Annotation on powers over managerial questions, p. 533.
- Annotation on Commission rules and regulations, p. 534.
- Discussion of the purpose and the success of Commission regulation with respect to interstate and intrastate commerce, p. 621.
- Statement that we have no such paternalism in government which undertakes to substitute the Public Service Commission as the board of directors of private business enterprises even of a quasipublic character, or of those charged with a public interest, p. 858.
1. The Commission has no authority to determine the wisdom of a legislative act placing a matter within the Commission's discretion. Re Central of Georgia Motor Transport Co. (Ala.) 535.
2. A utility may be presumed to know its own needs better than the Commission does and a statement by a railroad company that more necessary improvements must be delayed if a proposed separation of grades is P.U.R.1928E.

COMMISSIONS—*continued.*

ordered will be accepted as correct in the absence of a contrary showing. *Hartford v. New York, N. H. & H. R. Co. (Conn.)* 556.

3. The determination of charter rights of a corporation applying for a certificate of convenience and necessity is a judicial question over which the Commission has no jurisdiction as long as the company is endeavoring to carry on a utility business apparently within the scope of its charter. *Re Chicago & J. Transp. Co. (Ill.)* 481.

4. The Commission took judicial notice of the location of certain city streets and its personal knowledge of the traffic conditions thereon in passing upon a petition by a traction company to abandon portions of its city routes, notwithstanding the fact that the records contained no such descriptive evidence. *Re Portland R. Co. (Me.)* 300.

5. The publication of telephone directories, including the classified business section, is subject to the approved rules and regulations on file with the Commission. *Baldwin v. Chesapeake & P. Teleph. Co. (Md.)* 529.

6. The Public Service Commission of Maryland, created by the Acts of 1910 (Chap. 180), exercises a naked statutory authority, and has no powers except such as are expressly granted by the legislature, and such implied powers as are necessary to carry out the express powers. *West v. Philadelphia, B. & W. R. Co. (Md. Ct. App.)* 139.

7. The Commission, in passing upon a proposed relocation of track by an interstate railroad, is without authority to compel the carrier to relocate at a grade which, in the judgment of the company, will hamper efficiency and economy of operation where the general traveling public convenience does not require it and local property owners alone will be benefited thereby. *West v. Philadelphia, B. & W. R. Co. (Md. Ct. App.)* 139.

8. The public interest which is committed to the protection of the Commission is confined to the operation of utilities in such a manner as to furnish efficient service at reasonable rates, and it has no power to interfere with any corporate act or policy which will not in some manner adversely affect such public interest in rates or service. *West v. Philadelphia, B. & W. R. Co. (Md. Ct. App.)* 139.

9. There is nothing in the Public Service Acts of Maryland to support the theory that its purpose was to substitute the Commission for directors and officers of the corporation in the management and operation of a railroad, but every presumption is to the contrary. *West v. Philadelphia, B. & W. R. Co. (Md. Ct. App.)* 139.

10. The fact that a railroad is required by statute to secure the consent of the Commission to a relocation of track does not warrant the latter in arbitrarily withholding its approval at its own discretion for the benefit of private property holders. *West v. Philadelphia, B. & W. R. Co. (Md. Ct. App.)* 139.

11. The action of the Commission in dealing with the interests of the wider public involved in a railroad relocation should not be hampered or influenced by the necessity of considering the effect of the improvement on the local public, where it will beneficially affect the wider public of which the local public is a part. *West v. Philadelphia, B. & W. R. Co. (Md. Ct. App.)* 139.

P.U.R.1928E.

COMMISSIONS—*continued.*

12. The Commission is not a court and has no judicial power. *DeSalme v. Union Electric Light & P. Co.* (Mo.) 310.

13. It is the duty of the Commission to take cognizance of all law applying to it and to exercise every legal duty and responsibility placed upon it, recognizing that it is only an administrative body and that its powers and duties are not judicial. *DeSalme v. Union Electric Light & P. Co.* (Mo.) 310.

14. The Commission has jurisdiction to determine whether or not a consumer to whom service has been discontinued because of alleged unlawful diversion of current is guilty of such charge in order to prevent discrimination in service. *DeSalme v. Union Electric Light & P. Co.* (Mo.) 310.

15. The state, armed with police power and acting through a designated agency invested with the exclusive control, supervision, and regulation of public utilities, in the exercise of such powers, may strike down a so-called gross receipts tax provision of a municipal ordinance, the effect of which is to devote the revenues of a utility to the advantage of taxpayers, and discriminating to that extent against the rate payers. *Re Great Falls Gas Co.* (Mont.) 803.

16. Telephone companies operating in this state are subject to all reasonable orders of the State Railway Commission, entered upon hearings duly and legally had, as to rates to be charged, and time and manner of service to be rendered; and such orders will not be disturbed unless clearly wrong. *Farmers' & Merchants' Teleph. Co. v. Orleans Community Club* (Neb. Sup. Ct.) 787.

17. A Commission has no jurisdiction to eliminate undue congestion on the sidewalk in front of business houses caused by the congregating of prospective patrons waiting at the terminal of a street railway because of the failure of the utility to provide a waiting room. *Re public Service Coordinated Transport* (N. J.) 264.

18. One half of the voting members of the Commission finally concurred in the approval by the other half of a proposed utility consolidation where the likely absence for illness of the deciding Commissioner would tie up much capital to the injury of innocent stockholders if the matter were held open in deference to the wishes of the state's governor that certain parties, whose evidence could not affect the result, be given additional opportunity to be heard. *Re Consolidated Gas Co.* (N. Y.) 19.

19. The Commission has no power to determine the conditions upon which a street railway's striking employees should return to work, nor does it have jurisdiction in disputes over wages or terms of employment in public utility operation. *Citizens Committee of Summit Hill v. East Penn Electric Co.* (Pa.) 288.

20. A Board having discretion delegated by statute to order physical connection between two telephone companies and to apportion the expense thereof, "if in its judgment public service demands such connection and the lines of the applicant are in proper condition," may direct an urban telephone company to bear the entire cost of meeting the lines of a rural company proven to be properly constructed up to the corporate limits of the P.U.R.1928E.

COMMISSIONS—*continued.*

community where the former operates. Southwest Branch of Rural Reciprocal Teleph. Co. v. Dakota Central Teleph. Co. (S. D. Sup. Ct.) 757.

COMMON CARRIERS.

See **CARRIERS.**

COMPARISONS.

Comparisons to test reasonableness of rates, see **RATES**, 14, 15.

COMPETITION.

See **MONOPOLY AND COMPETITION.**

COMPLAINT.

See **PLEADINGS.**

CONFISCATION.

Allocation of gas plant between counties in confiscation case, see **APPORTIONMENT**, 12.

CONNECTION CHARGE.

Responsibility of company to another company for money collected from patrons for connection of electric extensions, see **INTERCORPORATE RELATIONS**, 3.

Approval of securities proposed by electric company guilty of irregular and improper methods of collecting connection charges, see **SECURITY ISSUES**, 4.

Present owners of premises to which utility has constructed line and stands ready to serve as under no contractual obligation to pay for installation as condition of receiving service, notwithstanding rule relating to former owner, who has defaulted in payment of note, see **SERVICE**, 11.

CONSOLIDATION, MERGER, AND SALE.

Concurrence by Commissioners in approval of utility consolidation to avoid tie vote where deciding Commissioner is absent because of illness, see **COMMISSIONS**, 18.

Voluntary organization for protection of consumers in development of water power in regard to regulation as not a proper party to consolidation proceedings, see **PARTIES**, 1.

Disapproval of immediate ex parte reduction in domestic lighting rates as part of proposed consolidation program, see **RATES**, 2.

Securities upon consolidation of companies, see **SECURITY ISSUES**, 5, 6. Purchase price of controlling stock as a charge to capital, see **VALUATION**, 41.

1. A complaint of a city seeking an extension of exchange boundaries will not be prejudiced in any manner by the granting, in another proceeding, of authorization to purchase the stock of the utility involved and a m-P.U.R.1928E.

CONSOLIDATION, MERGER, AND SALE—*continued.*
tion that hearing on the latter question be continued will be denied. *Re Pacific Teleph. & Teleg. Co. (Cal.)* 80.

2. The Commission has no jurisdiction over the purchase and sale of the property of public utilities and, therefore, has no authority to approve a contract between companies with respect to such a transaction. *Re Public Service Co. (Colo.)* 778.

3. Alleged gross overcapitalization in the proposed purchase of controlling stock of operating companies by a holding company was held not to be established affirmatively by mere difference of opinion of experts as to the relative weight of various factors in valuation, where the possibility of increased revenue from rural electrification might explain such variation of opinion. *Electric Pub. Utilities Co. v. Public Service Commission (Md. Cir. Ct.)* 854.

4. Consolidation of public utility corporations cannot be denied by the Commission on the grounds of overcapitalization or excessive purchase price for controlling stock as being detrimental to public interest, in view of the complete jurisdiction of the Commission both as to rates and services of the operating company. *Electric Pub. Utilities Co. v. Public Service Commission (Md. Cir. Ct.)* 854.

5. The consolidation of a gas and electric company operating in a large metropolitan area was approved upon proof that the resulting unified management, policies and practices would enable future financing to be more advantageous to all parties as well as to keep pace with city growth, produce great economies in location of generating stations, as well as capital expenditures and operating expenses, besides reducing rates and eliminating current rate differentials. *Re Consolidated Gas Co. (N. Y.)* 19.

6. It was the attitude of the Commission in determining an application for a consolidation of public utilities that the application should be rejected unless it was affirmatively shown to be in the public interest of the consumers. *Re Consolidated Gas Co. (N. Y.)* 19.

7. It is not necessary to write into a consolidation plan as a condition to its approval, any equivalent for the competition which is thereby eliminated, in view of the continuing regulation which will protect the people from the inertia of a monopoly. *Re Consolidated Gas Co. (N. Y.)* 19.

8. The contention that the huge proportions of a proposed merger will permit domination in the state resulting in the exploitation of water power cannot be considered where the petition is not concerned with the use of the state's water power. *Re Consolidated Gas Co. (N. Y.)* 19.

9. It is unnecessary for consolidating companies to compute in advance the exact amount of rate reduction to be expected from economies resulting from the proposed coalition where some saving will unquestionably be effected. *Re Consolidated Gas Co. (N. Y.)* 19.

10. Consolidation proceedings cannot be transformed into a rate case merely because of a marked increase in the market value of the securities involved. *Re Consolidated Gas Co. (N. Y.)* 19.

11. A proposed consolidation of electric utilities at a purchasing price apparently in excess of the fair value of the properties acquired, was dis-P.U.R.1928E.

CONSOLIDATION, MERGER, AND SALE— *continued.*

approved as being opposed to public interest. *Re New York Power & Light Corp.* (N. Y.) 781.

CONSTITUTIONAL LAW.

Constitutional provision reserving to State Commission control over rates as divesting municipalities of powers previously exercised, see **RATES**, 9.

1. A proposed plan for the regulation of grain storage space which allowed three directors, themselves traders, of a warehouse corporation to have exclusive information as well as the machinery of control of all the potential warehouse space in the market to their own advantage, permitting a disorganization of national and international grain markets, was held to be inconsistent with the public policy established by Article XIII of the Constitution of Illinois. *Re Board of Trade Warehouse Corp.* (Ill.) 65.

2. The requirements of due process of law are complied with, in the absence of statutory directions, when actual written notice of a Commission hearing is given to the interested party. *Re Great Falls Gas Co.* (Mont.) 803.

3. The failure of the Department in the valuation of its telephone utility to make an allowance for going concern, but proceeding in accordance with the elements enumerated for its consideration by a state statute, was held not to be a deprivation of property without due process of law, in contravention of the Federal and state Constitutions. *Columbia River Teleph. Co. v. Department of Public Works* (Wash. Sup. Ct.) 520.

4. State statutes attempting to delegate to State Commissions the discretion to determine, not the use of the state's highways, but the persons by whom such highways may be used, prohibiting their use to some and permitting their use to others, are unconstitutional. *Hi-Ball Transit Co. v. Texas R. Commission* (U. S. Dist. Ct.) 103.

5. State statutes attempting to delegate to State Commissions the discretion to determine the financial ability of interstate motor carriers are unconstitutional. *Hi-Ball Transit Co. v. Texas R. Commission* (U. S. Dist. Ct.) 103.

6. A State Commission exercising its powers of regulation in such an unreasonable manner as to prevent a carrier from obtaining a fair return upon its property devoted to public service, is acting contrary to the due process provision of the 14th Amendment to the Constitution, and such action is accordingly void. *Los Angeles R. Corp. v. California R. Commission* (U. S. Dist. Ct.) 584.

7. The Federal Court has jurisdiction to declare confiscatory and unconstitutional an order of a State Commission which has actually exercised its superior regulatory powers in setting aside a rate fixed by contract between a utility and a municipality. *Los Angeles R. Corp. v. California R. Commission* (U. S. Dist. Ct.) 584.

8. The Federal constitutionality of a state statute need not be tested in lower Federal Court, but may lawfully be reviewed in the courts of the state where the laws of the latter provide that an appeal may be had from the highest court of the state to the Supreme Court of the United States. P.U.R.1928E.

CONSTITUTIONAL LAW—*continued.*

St. Louis-S. F. R. Co. v. Alabama Pub. Service Commission (U. S. Dist. Ct.) 613.

9. No penal statute can deprive a defendant of the right to review and test its validity in any criminal proceeding which may be instituted. St. Louis-S. F. R. Co. v. Alabama Pub. Service Commission (U. S. Dist. Ct.) 613.

CONSUMERS AND PATRONS.

Terms upon which extensions must be made, see SERVICE, 13-17.

Merging of telephone exchanges as affected by lack of popular approval, see TELEPHONES, 1.

CONSUMPTION.

Allocation of water service on consumption basis rather than demand basis, see APPORTIONMENT, 10.

CONTRACTS.

Lack of Commission jurisdiction to approve contract between companies relating to purchase and sale of property, see CONSOLIDATION, MERGER, AND SALE, 2.

Denial of adequate return by Commission which has exercised superior regulatory powers in setting aside rate fixed by contract, see CONSTITUTIONAL LAW, 7.

Franchise generally, see FRANCHISES.

Contract rates, see RATES, 19-21.

Collateral attack on supply contract, see RETURN, 12.

Present owners of premises to which utility has constructed line and stands ready to serve as under no contractual obligation to pay for installation as condition of receiving service, notwithstanding rule relating to former owner who has defaulted in payment of note, see SERVICE, 11.

CONVENIENCE.

See CERTIFICATES OF CONVENIENCE AND NECESSITY.

CORPORATE FICTION.

Liberal construction of statute in favor of public, disregarding corporate fiction, where unlawful monopolistic result is found to exist by use of device which gives control over use of public space to those who admittedly own the grain stored therein, see INTERCORPORATE RELATIONS, 1.

CORPORATIONS.

Granting of certificate to operate bus routes notwithstanding contention that subsidiary of railroad incorporated by receiver was acting *ultra vires*, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 8.

P.U.R.1928E.

COSTS AND EXPENSES.

Order fixing compensation for switching service between telephone companies as not to be reversed in the absence of evidence showing expense of rendering such service will be increased by amount in excess of provided compensation, see **APPEAL AND REVIEW**, 2.

Commission jurisdiction over apportionment of expense of physical connection, see **COMMISSIONS**, 20.

Apportionment of cost of eliminating crossing, see **CROSSINGS**, 2.

Power of Commission to require evidence of probable expenditures required of railway for proposed resurfacing of city street and relaying of rails, in passing upon petition for abandonment, see **EVIDENCE**, 4.

Excessive production costs in one city as indication of obsolete pumping equipment, low load factor, and possibility of more economical administration, see **EVIDENCE**, 5.

Operating expenses and other deductions from gross revenues, see **RETURN**, 4-15.

Board as not authorized to order installation of additional equipment or facilities such as maintenance of waiting room at terminal unless revenues justify expense, see **SERVICE**, 6.

Terms upon which extensions must be made, see **SERVICE**, 13-17.

Matters relating to abandonment of service generally, see **SERVICE**, 18-30.

Methods and measures used in determining value generally, see **VALUATION**, 3-10.

Treatment of financing costs in valuation, see **VALUATION**, 37-40.

Practice considered in allowing for working capital, see **VALUATION**, 49-54.

COUNTIES.

Apportionment questions generally, see **APPORTIONMENT**.

COURTS.

Determination of charter rights of corporation applying for certificate as a judicial question not within Commission jurisdiction, see **COMMISSIONS**, 3.

Commission as not a court with judicial powers, see **COMMISSIONS**, 12.

Federal constitutionality of state statute as not necessarily to be tested in lower Federal Court in view of review in state court where appeal to Supreme Court of United States is provided, see **CONSTITUTIONAL LAW**, 8.

Stay of proceedings in state court against utility pending determination in Federal Court of petition for voluntary bankruptcy as automatically ineffective and properly vacated upon dismissal of bankruptcy petition, see **INJUNCTION**, 1.

1. After a hearing by a statutory Federal court of three judges on an application to enjoin a State Commission, jurisdiction may be had by a single Federal judge for a subsequent trial where no final action had been P.U.R.1928E. 56

COURTS—*continued.*

taken by the first tribunal which had granted the intervening period for the purpose of permitting the State Commission to reconsider its action. *Hi-Ball Transit Co. v. Texas R. Commission* (U. S. Dist. Ct.) 103.

2. The Federal Court has no jurisdiction to order a State Commission in the intrastate field. *Hi-Ball Transit Co. v. Texas R. Commission* (U. S. Dist. Ct.) 103.

3. The duty of the United States Court is to take jurisdiction of any case where the facts show that such court has jurisdiction where the plaintiff has neglected to sue in the Federal tribunal. *Los Angeles R. Corp. v. California R. Commission* (U. S. Dist. Ct.) 584.

CRIMINAL STATUTE.

Penal statute as not to deprive defendant of right to review and test its validity in criminal proceeding, see **CONSTITUTIONAL LAW**, 9.

CROSSINGS.

Annotation on crossing regulation by the Commission or state, p. 566.
Annotation on crossing regulation by local authorities, p. 568.

Annotation on apportionment of expense of grade separation and crossing elimination, p. 569.

Annotation on grade separation and crossing elimination, p. 569.

Annotation on degree of danger as affecting grade separation and crossing elimination, p. 571.

Annotation on various considerations in crossing elimination, p. 572.

Annotation on establishment of grade crossings, p. 574.

Annotation on protection of existing crossings, p. 576.

1. Primary reasons for the elimination of grade crossings in populous centers having 24-hour gate protection were held to be the delay to highway traffic and the obstruction of city development rather than dangerous character of the crossings. *Hartford v. New York, N. H. & H. R. Co.* (Conn.) 556.

2. The heavy burden of expense placed upon a railroad company by state statute for the elimination of grade crossing made primarily necessary for the city's development is a matter over which the Commission has no control other than to consider the amount involved in respect to the company's financial condition and the necessity of other necessary improvements. *Hartford v. New York, N. H. & H. R. Co.* (Conn.) 556.

CUMULATIVE EVIDENCE.

Evidence as to market value of utility property which is merely cumulative of like evidence introduced in original proceedings as objectionable, see **EVIDENCE**, 10.

DAMAGES.

1. A patron refused electric service without justification because of a failure to obey water regulations may not recover for the resulting damages where there was no separate tender of payment or demand for light service P.U.R.1928E.

DAMAGES—continued.

independent of water service. *Antisdel v. Macatawa Resort Co.* (Mich. Sup. Ct.) 606.

DEFINITIONS.

Meaning of public interest, see PUBLIC UTILITIES, 2.

Definition of fair value, see VALUATION, 1.

Definition of working capital, see VALUATION, 52.

Definition of going value, see VALUATION, 59.

DEMAND.

Allocation of water service on consumption basis rather than demand basis, see APPORTIONMENT, 10.

Demand factor in electric rate schedules, see RATES, 25-30.

Demand factor in water rate schedules, see RATES, 36-42.

DEPARTMENTS.

Apportionment questions generally, see APPORTIONMENT.

Refusal of light for violation of water regulation, see SERVICE, 33.

DEPRECIATION.*I. In general, 1-12.**II. Determination of accrued depreciation, 13-15.**III. Specific allowances for annual depreciation, 16-26.**I. In general.*

Use of current assets offsetting depreciation reserve for additions or extensions to fixed capital, see RETURN, 3.

Annotation on necessity for allowance for depreciation, p. 663.

Annotation on calculation of depreciation allowance, p. 664.

Annotation on basis for computing depreciation, p. 665.

Annotation on straight-line and sinking-fund method of computing depreciation, p. 665.

Statement that depreciation is a reserve to equalize retirements and not a reserve to equalize replacements, p. 230.

Discussion of consideration to be given "latent" depreciation in the computation of the annual allowance, p. 468.

Statement that a property that has been properly operated makes its budget of expenses so that approximately the same amount will be expended each year on retirements, p. 468.

1. It is fundamental in a rate proceeding that depreciation, being an important item of expense, and a proper charge, should be correct and proven in order to determine accurately the financial condition of the carriers involved. *Bay and River Boat Owners' Asso. v. Anderson* (Cal.) 86.

2. The history of a utility's operation furnishing no reliable index to the cost of maintenance and depreciation of its property in current condition because of past irregularities in bookkeeping in which the distinction P.U.R.1928E.

DEPRECIATION--continued.

between depreciation, repairs and maintenance charges were not observed, it was held to be safer from the standpoint of all concerned that an allowance be made for the aggregate amount needed to insure the upkeep of the property and to provide against depreciation thereof. Re Illinois Bell Teleph. Co. (Ill.) 279.

3. The State Commission deemed it inadvisable and unnecessary to make a division in fixing the rate of depreciation between depreciation and maintenance in view of the fact that the exact limitation and distinction of the two charges were not finally settled by the Interstate Commerce Commission and a decision thereon was still pending. Re Illinois Bell Teleph. Co. (Ill.) 279.

4. Items of organization and franchise were excluded from the make up of depreciable property of a water utility in view of a claim made by such utility that the assets represented by such amounts had no cash value for taxation purposes. Re Elwood Water Co. (Ind.) 699.

5. It was held to be highly illogical to assume that the probable future life of all water pipes of a system should be classed the same and given the same expected life, or that the smaller galvanized pipes should carry the same expected life as the larger and heavier galvanized pipes. Re Lexington Water Co. (Mo.) 322.

6. The fact that electric pumping equipment can be installed and operated at a great saving over the current operation of a steam pumping equipment, should be reflected in consideration of the probable life of the latter for valuation purposes. Re Lexington Water Co. (Mo.) 322.

7. Utility companies are required to set aside a reserve fund for the purpose of protecting the investment in the property so that at the end of its useful life the investor will have recovered his investment. Re United R. Co. (Mo.) 419.

8. The purpose of a depreciation reserve is to retire the actual cost of the depreciable property at the end of its useful life. Re United R. Co. (Mo.) 419.

9. The inability of a utility to earn a fair rate of return and at the same time take care of depreciation does not constitute an argument excusing failure to set aside such fund. Re Great Falls Gas Co. (Mont.) 803.

10. The cost of utility property is the only possible reasonable authority upon which depreciation can be calculated. Re Rock Hill Teleph. Co. (S. C.) 221.

11. Depreciation reserve is intended to keep the utility investment level, but not to insure the hazards of the varying future. Re Rock Hill Teleph. Co. (S. C.) 221.

12. Depreciation allowance that would enable a telephone company to reproduce its entire plant within eight years was held to be unreasonable in view of the amount of money spent each year for upkeep. Re Rock Hill Teleph. Co. (S. C.) 221.

II. Determination of accrued depreciation.

Deduction of depreciation in valuation proceedings, see **VALUATION, 17-19.**

Annotation on ascertainment of accrued depreciation, p. 666.
P.U.R.1928E.

DEPRECIATION—continued.

Discussion as to the distinction between theoretical and actual depreciation intended to be drawn by leading decisions from the United States Supreme Court and other tribunals holding that physical inspection of property is necessary, p. 414.

13. The theory that depreciation in a well-maintained or alleged 100 per cent efficient utility property is nonexistent was held to be in irreconcilable conflict with the great weight of authority. *Re Union Electric Co. (Mont.)* 396.

14. The balance in a utility's depreciation reserve was not taken as an indication of the accrued depreciation where it was intended only as a theoretical estimate, where nothing was paid into the account for a considerable period, and where a large portion of the property had begun to function in a second-hand condition. *Re Union Electric Co. (Mont.)* 396.

15. An amount of 2 per cent of depreciable value of a natural gas utility property fixed as a depreciation annuity in a previous decision, was taken as a measurement for accrued depreciation during the period elapsed since that decision. *Re Great Falls Gas Co. (Mont.)* 803.

III. Specific allowances for annual depreciation.

Annotation on rate of depreciation for automobiles, p. 666.

Annotation on depreciation of electric utility, p. 667.

Annotation on depreciation of street railway, p. 667.

Annotation on depreciation of telephone company, p. 667.

Annotation on depreciation of waterworks, p. 669.

16. An allowance for depreciation was made of 5 per cent on vessels where the evidence showed that the average life of the hulls was at least twenty years, and the life of the machinery therein of a considerably longer duration. *Bay and River Boat Owners' Assn. v. Anderson (Cal.)* 86.

17. An aggregate allowance of 9 per cent of the investment in fixed capital of a telephone utility was submitted as an annual charge for repairs, maintenance, and depreciation. *Re Illinois Bell Teleph. Co. (Ill.)* 279.

18. A proposed allowance of 5 per cent per annum for depreciation over depreciable property of a telephone utility was held to be excessive, and a composite rate of 4 per cent per annum was established. *Re Decatur County Independent Teleph. Co. (Ind.)* 1.

19. An allowance of 1 per cent was made on the depreciable value of water utility property as shown by company records. *Re Elwood Water Co. (Ind.)* 699.

20. An allowance of 5 per cent per annum on the book cost of the depreciable property of a telephone utility was made for depreciation charge. *Re Logansport Home Teleph. Co. (Ind.)* 714.

21. An allowance of \$4,500 a year was made to provide a fund for the retirement of a physical property of a water company having a total fair value of all elements in the amount of \$285,000. *Re Lexington Water Co. (Mo.)* 322.

22. An amount of \$800,000 was allowed for annual depreciation of street railway properties (having a fair value of \$66,000,000). *Re United R. Co. (Mo.)* 419.

P.U.R.1928E.

DEPRECIATION—continued.

23. An allowance of 8 per cent of the physical depreciable property of a natural gas utility was made for annual depreciation. *Re Great Falls Gas Co.* (Mont.) 803.
24. An allowance of 5 per cent was held to be ample to protect depreciation of a telephone plant. *Re Rock Hill Teleph. Co.* (S. C.) 221.
25. An allowance of 3.68 per cent of the fixed operating property of a water supply company, exclusive of land, was authorized for depreciation. *Department of Public Works ex rel. Asotin v. Pacific Power & Light Co.* (Wash.) 213.
26. An allowance of 5.5 per cent was held to be reasonable for the depreciation of an electric plant, exclusive of land. *Department of Public Works ex rel. Friday Harbor v. Friday Harbor Light & P. Co.* (Wash.) 660.

DIRECTORIES.

- Publication of telephone directories including classified business section as subject to rules of Commission, see **COMMISSIONS**, 5.
- Accidental errors in telephone directory listing as not basis for claim for unlawful discrimination, see **DISCRIMINATION**, 4.
- Special reference directory listing for physicians, see **RATES**, 34.
- Revenues and expenses of telephone directories, see **RETURN**, 2.

DISCONTINUANCE OF SERVICE.

- Discontinuance of service to enforce payment, see **PAYMENT**, 2.
- Abandonment and discontinuance of service generally, see **SERVICE**, 18-30.

DISCRIMINATION.

- Establishment of free interexchange telephone service, see **RATES**, 35.

1. It is the duty of public utility carriers to lay before the Commission all facts within their knowledge tending to show that rival carriers are departing from published tariffs. *Bay and River Boat Owners' Asso. v. Anderson* (Cal.) 86.

2. A proposed plan permitting certain lessors of warehouse space to reserve privileges for their own grain upon a mere statement, but requiring all other persons to tender grain before storage space could be demanded, was held to be a violation of statute prohibiting discrimination between persons desiring to avail themselves of warehouse facilities. *Re Board of Trade Warehouse Corp.* (Ill.) 65.

3. A proposed plan for the regulation of grain storage which will permit a certain group of dealers to obtain information, unavailable to the public, concerning the amount of space vacant, thereby giving such group an advantage over the market, was held to contain an illegal preference. *Re Board of Trade Warehouse Corp.* (Ill.) 65.

4. Accidental errors in telephone directory listing which the utility promises to correct at the earliest opportunity does not constitute sufficient basis for a claim of unlawful discrimination, and the Commission will not issue an order requiring the company to correct such errors. *Baldwin v. Chesapeake & P. Teleph. Co.* (Md.) 529.

P.U.R.1928E.

DISCRIMINATION—*continued.*

5. It is the duty of the Commission in determining whether or not free interexchange telephone service should be re-established between certain points to take into consideration the interest of all of the telephone patrons regardless of their occupations and to find that the proposed service would be a benefit to the patrons generally, and not to a privileged fraction having need of such communication. *Dearborn v. Midwest Teleph. Co.* (Mo.) 175.

6. Free service to a municipality for use in its public buildings is a discrimination against other consumers, and the city should purchase its water on a metered basis the same as other consumers. *Re Lexington Water Co.* (Mo.) 322.

7. A special rate of 21.7 cents per thousand gallons to six large consumers of a water company was held to be proportionately inadequate where the combined production and distribution expense was 20 cents for a like amount. *Re Lexington Water Co.* (Mo.) 322.

8. A statutory prohibition against discrimination by telephone companies between "persons or companies in the switching, transfer or delivery of messages" was held to apply only to the charges made by a company for services to its own subscribers, and to have no force in case of one company switching subscribers of other companies. *Southwest Branch of Rural Reciprocal Teleph. Co. v. Dakota Central Teleph. Co.* (S. D. Sup. Ct.) 757.

9. The fact that a continuation of a transfer agreement between two traction lines, one of which has been permitted to increase fares, will result in a passenger going in one direction to pay more than a passenger making the return trip, was held not to be unjustifiably discriminatory in view of the two-way traffic usual on such connection. *Re Milwaukee Electric R. & Light Co.* (Wis.) 15.

DISPUTES.

Discontinuance of service to customer having controversy with utility,
see SERVICE, 26.

DISTRICTS.

Commission as not to determine whether utility district has complied
with all requirements of law in organization, see SERVICE, 1.

DIVERSION OF CURRENT.

Commission jurisdiction to determine whether or not consumer to whom
service has been discontinued because of alleged unlawful diversion
of current is guilty of such charge, see COMMISSIONS, 14.

DUE PROCESS.

See CONSTITUTIONAL LAW.

DUTY TO SERVE.

Generally, see SERVICE, 8-12.

EASEMENTS.

Allowance for right of way, see VALUATION, 70-75.
P.U.R.1928E.

ECONOMIES.

Advantages of consolidation of gas and electric companies, see CONSOLIDATION, MERGER, AND SALE, 5.

ELECTRICITY.

Apportionment questions generally, see APPORTIONMENT.

Commission as not justified in permitting electric company to serve competitive territory in proceeding in which complaint is made against rates of existing utility, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 9.

Advantages of consolidation of gas and electric companies, see CONSOLIDATION, MERGER, AND SALE, 5.

Damages for refusal of electric service, see DAMAGES, 1.

Allowance for depreciation of various utilities, see DEPRECIATION, 16-26.

Responsibility of company to another company for money collected from patrons for connection of electric extensions, see INTERCORPORATE RELATIONS, 3.

Questions of competition generally, see MONOPOLY AND COMPETITION. Uniform electric rates in city and suburban areas, see RATES, 13.

Electric rates generally, set RATES, 25-30.

Specific amounts allowed for return of public utility companies, see RETURN, 19-29.

Refusal of light for violation of water regulation, see SERVICE, 33.

1. An electric company found to have imperfect and dangerous construction was ordered to comply with the provisions of the National Electrical Safety Code of the department of commerce before collecting any money for further extensions. Re Rush County Power Co. (Ind.) 670.

EMERGENCY EQUIPMENT.

Spare parts for street car system as stand-by equipment rather than part of materials and supplies, see ACCOUNTING, 1.

EMPLOYEES.

Lack of Commission power to determine conditions upon which street railway's striking employees should return to work, see COMMISSIONS, 19.

ENGINEERING.

Treatment of overheads in valuation, see VALUATION, 20-36.

EQUIPMENT AND CONSTRUCTION.

Spare parts for street car system as stand-by equipment rather than part of materials and supplies, see ACCOUNTING, 1.

Commission powers over managerial questions relating to improvements, see COMMISSIONS, 2.

Lack of Commission authority to compel relocation of tracks for benefit of local property owners, see COMMISSIONS, 7.

P.U.R.1928E.

EQUIPMENT AND CONSTRUCTION—*continued.*

Requirement that company comply with provisions of National Electrical Safety Code before collecting for further extensions, see ELECTRICITY, 1.

Excessive production costs in one city as indication of obsolete pumping equipment, low load factor, and possibility of more economical administration, see EVIDENCE, 5.

EVIDENCE.

Denial of rate reduction unless there is evidence that will permit reasonable determination as to advisability of such action, see RATES, 1.

1. The sole consideration on a complaint against the discontinuance of a spur track by a railroad without leave of the Commission in violation of its general order is to determine why such order was disregarded and evidence as to lack of necessity or safety of such equipment is immaterial. Hitchcock & Tinkler Equipment Co. v. Denver & Salt Lake R. Co. (Colo.) 681.

2. A sample of water drawn from a company's main was admitted as evidence tending to show that the supply was muddy and in such poor condition as to make it unfit for use. Re Elwood Water Co. (Ind.) 699.

3. The testimony of a witness qualifying as an expert which failed to give proper weight to proper intangible elements of utility valuation was regarded as of doubtful value. Re Logansport Home Teleph. Co. (Ind.) 714.

4. The Commission may reasonably require evidence of probable expenditures required of a street railway company for a proposed resurfacing of the city street and the relaying of rails, in passing upon a petition to abandon traction service over such street. Re Portland R. Co. (Me.) 300.

5. That the production cost of water in one city was excessive as compared with the same costs in other similar cities was taken as one indication of obsolete pumping equipment, low load factor, and a possibility of more economical administration. Re Lexington Water Co. (Mo.) 322.

6. An audit covering telephone operations for a period of six months was excluded, where the unit of time covered by a proposed rate was a year, where it covered the slack business portion of the year and where another audit of the entire year was available but with which it could not be combined without conflict. Re Rock Hill Teleph. Co. (S. C.) 221.

7. The fact that at the time an audit was made the utility did not realize the influence of original cost upon its rate application, is no justification for not stating the audit accurately if it could be done. Re Rock Hill Teleph. Co. (S. C.) 221.

8. The fact that significance of original cost was not understood when an audit was made, was believed to tend toward freeing such statement from doubt and add rather than subtract from its value as evidence. Re Rock Hill Teleph. Co. (S. C.) 221.

9. Evidence as to the validity or reasonableness of a past rate schedule not under attack is inadmissible. Re Clarksburg Light & Heat Co. (W. Va.) 728.

P.U.R.1928E.

EVIDENCE—*continued.*

10. Evidence as to market value of utility property which is merely cumulative of like evidence introduced in original proceedings is objectionable. *Re Clarksburg Light & Heat Co. (W. Va.)* 728.

EXCESSIVE PURCHASE PRICE.

Treatment of excessive purchase price in consolidation proceedings, see **CONSOLIDATION, MERGER, AND SALE**, 3.

EXCHANGES.

Apportionment questions generally, see **APPORTIONMENT**.

Complaint of city seeking extension of exchange boundaries as not to be prejudiced by granting in another proceeding authorization to purchase stock of utility involved, see **CONSOLIDATION, MERGER, AND SALE**, 1.

Factors to be considered by Commission in determining whether free interexchange telephone service should be re-established, see **DISCRIMINATION**, 5.

Merging of telephone exchanges as affected by lack of popular approval, see **TELEPHONES**, 1.

EXHAUSTION OF REMEDIES.

Exhaustion of remedies before appealing to Federal court, see **INJUNCTION**, 7, 9.

EXPERTS.

Expert's testimony of intangible values, see **EVIDENCE**, 3.

EXTENSION OF SERVICE.

Extensions of service generally, see **SERVICE**, 13-17.

Responsibility of company to another company for money collected from patrons for connection of electric extensions, see **INTERCORPORATE RELATIONS**, 3.

FEDERAL COURTS.

See **COURTS**.

FEDERAL INCOME TAX.

Federal income tax as an operating expense, see **RETURN**, 14, 15.

FILING.

Necessity of filing schedules with Commission, see **RATES**, 22.

FINANCIAL ABILITY.

Financial ability as a factor in granting certificate for motor coach line, see **CERTIFICATES OF CONVENIENCE AND NECESSITY**, 7.

Financial embarrassment of street railway company as no defense to ordinance requiring raising tracks to conform with new level in street which is to be repaved, see **STREET RAILWAYS**, 1.

P.U.R.1928E.

FINANCING.

Advantages of consolidation of gas and electric companies, see CONSOLIDATION, MERGER, AND SALE, 5.

Treatment of financing costs in valuation, see VALUATION, 37-40.

FINES AND PENALTIES.

1. A motor operator found guilty of violating a tariff was permitted at his request to pay \$50 to the secretary of the Commission to be turned into the state treasury in lieu of the suspension of his certificate, notwithstanding a doubt whether the Commission had authority to impose a fine upon such operator. *Re G. & W. Garage and Tours Co.* (Colo.) 64.

2. A water company upon resuming service after a justifiable discontinuance, because of misrepresentation by patrons, can make no additional charge except what is sufficient to cover the loss sustained by reason of the misrepresentation or the misconduct. *Parker v. St. Joseph Water Co.* (Mo.) 161.

FLYING FIELDS.

Electric rates for airway beacons, see RATES, 27.

FRANCHISES.

Authority to exercise franchise powers given in ordinance which also specifies rates to be charged upon condition that utility waive any rights to charge such rates without approval of Commission, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 2.

Consent of local authority to construction and operation of gas transmission system, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 11.

Power of Federal Court to enjoin Commission rate order when franchise contract between city and utility has been terminated by provision of State Constitution, see INJUNCTION, 8.

Commission power to change rates fixed by franchise contract, see RATES, 8.

Franchise ordinances fixing rates, see RATES, 19-21.

Treatment of, in valuation, see VALUATION, 55.

1. No contractual rights exist between a municipality and a public utility based upon a franchise until its certificate of public convenience and necessity is issued by the Commission authorizing the exercise of the rights under such franchise, and a franchise purporting to be obtained previous to the grant of such Commission authority is void. *Re Public Service Co. (Colo.) 778.*

2. A street railway was ordered to obey a city ordinance requiring it to raise its tracks to conform with the proposed level in the repaving of a street within fifteen days or have its indeterminate permit revoked. *Hammond v. Hammond, W. & E. C. R. Co.* (Ind.) 577.

3. A natural gas utility was, by Commission order, relieved of the burden imposed by a franchise requiring the payment of a gross receipts tax which operated to the unjust advantage of the taxpayers as against the utility's rate payers. *Re Great Falls Gas Co.* (Mont.) 803.

P.U.R.1928E.

FRANCHISES—*continued.*

4. Special privileges conferred upon utilities in consideration for their providing facilities for public communication and intercourse are held by the utility as agents and trustees for the sovereign power, and are in no sense private. *Columbia R. Gas & E. Co. v. South Carolina* (U. S. C. C. A.) 235.

FREE INTEREXCHANGE SERVICE.

Factors to be considered by Commission in determining whether free interexchange telephone service should be re-established, see DISCRIMINATION, 5.

Force of Commission order recognizing existence of free telephone service between certain points, see ORDERS, 1.

Establishment of free interexchange telephone service, see RATES, 35.

FUNDS.

See RESERVES AND FUNDS.

GAS.

Apportionment questions generally, see APPORTIONMENT.

Refusal of Commission to grant authority to do that which has already been done, such as construction and operation of parts of a proposed gas distribution plant, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 10.

Advantages of consolidation of gas and electric companies, see CONSOLIDATION, MERGER, AND SALE, 5.

Allowance for depreciation of various utilities, see DEPRECIATION, 16-26.

Allowance for amortization of gas generating plant rendered nonoperative by substitution of natural gas supply, see RETURN, 4.

Specific amounts allowed for return of public utility companies, see RETURN, 19-29.

Securities upon consolidation of companies, see SECURITY ISSUES, 5, 6.

GENERAL CONSTRUCTION COSTS.

Treatment of overheads in valuation, see VALUATION, 20-36.

GOING VALUE.

Denial of allowance for going value as not necessarily deprivation of property in contravention of Constitution, see CONSTITUTIONAL LAW, 3.

Refusal of authorization of securities based on going concern value, see SECURITY ISSUES, 1.

Treatment of, in valuation, see VALUATION, 56-68.

GOOD WILL.

Good will as not an element of going concern value, see VALUATION, 62. P.U.R.1928E.

GRAIN.

- Plan for grain monopoly as inconsistent with public policy established, by Illinois Constitution, see **CONSTITUTIONAL LAW**, 1.
- Discriminatory nature of plan permitting lessors of warehouse space to reserve privileges for grain upon mere statement while other persons are required to tender grain before storage space could be demanded, see **DISCRIMINATION**, 2.
- Liberal construction of statute in favor of public, disregarding corporate fiction, where unlawful monopolistic result is found to exist by use of device which gives control over use of public space to those who admittedly own the grain stored therein, see **INTER-CORPORATE RELATIONS**, 1.
- Warehouses and grain monopoly, see **MONOPOLY AND COMPETITION**, 10-13.
- Railroad charges for handling grain, see **RATES**, 31.
- Grain milling and storage in transit, see **SERVICE**, 41.

GROSS RECEIPTS TAX.

- Power of state to relieve utility from gross receipts tax provision of municipal ordinance, see **COMMISSIONS**, 15.

GROSS REVENUES.

- Operating expenses and other deductions from gross revenues, see **RETURN**, 4-15.

HEARING.

- Notice of hearing in compliance with constitutional requirements, see **CONSTITUTIONAL LAW**, 2.
- Waiver of notice of hearing, see **PROCEDURE**, 2.

HEATING.

- Electric rates for heating and refrigeration, see **RATES**, 28.

HIGHWAYS AND STREETS.

- Judicial notice by Commission of location of certain city streets and of traffic conditions in petition for authority to abandon street car lines, see **COMMISSIONS**, 4.
- Power of Commission to require evidence of probable expenditures required of railway for proposed resurfacing of city street and relaying of rails in passing upon petition for abandonment, see **EVIDENCE**, 4.
- Order that street railway obey ordinance requiring raising of tracks to conform with level of street or have its indeterminate permit revoked, see **FRANCHISES**, 2.
- Financial embarrassment of street railway company as no defense to ordinance requiring raising tracks to conform with new level in street which is to be repaved, see **STREET RAILWAYS**, 1.
- Presumption that municipal officers will deal fairly with street railway company in matter of resurfacing street, see **STREET RAILWAYS**, 2.

P.U.R.1928E.

HISTORICAL COST.

Historical cost as basis of security issues, see SECURITY ISSUES, 2.
Methods and measures used in determining value generally, see VALUATION, 3-10.

ILLINOIS.

Plan for grain monopoly as inconsistent with public policy established by Illinois Constitution, see CONSTITUTIONAL LAW, 1.

INCOME TAX.

Federal income tax as an operating expense, see RETURN, 14, 15.

INDETERMINATE PERMIT.

See also FRANCHISES.

Indeterminate permit for municipal operation of utility service in another municipality, see MUNICIPAL PLANTS, 1, 2.

INDEX NUMBERS.

Methods and measures used in determining value generally, see VALUATION, 3-10.

INEFFICIENCY.

Excessive production costs in one city as indication of obsolete pumping equipment, low load factor, and possibility of more economical administration, see EVIDENCE, 5.

INJUNCTION.

Trial by Federal judge where temporary injunction against Commission has been granted by statutory Federal Court of three judges, see COURTS, 1.

Annotation on injunctions generally, p. 258.

Annotation on what may be enjoined, p. 259.

1. A stay of proceedings in state court against a utility pending a determination in Federal Court of a petition for voluntary bankruptcy is automatically ineffective and properly vacated upon the dismissal in Federal Court of such bankruptcy petition. Columbia R. Gas & E. Co. v. South Carolina (U. S. C. C. A.) 235.

2. Injunctive relief against a State Commission refusing to authorize interstate motor carriers was denied where there was grave doubt as to whether the carrier was confining its activities strictly to interstate commerce. Hi-Ball Transit Co. v. Texas R. Commission (U. S. Dist. Ct.) 103.

3. Governmental acts within the general power of the state are presumptively valid, and ought not to be interfered with by a Federal Court upon a mere balance of possible injuries. Cambridge Electric Light Co. v. Atwill (U. S. Dist. Ct.) 253.

4. To warrant interference with an order of a State Commission by a Federal Court, it must appear that there is a reasonable probability that P.U.R.1928E.

INJUNCTION—*continued.*

the utility will prevail upon final hearing. Cambridge Electric Light Co. v. Atwill (U. S. Dist. Ct.) 253.

5. The presence of material questions too doubtful for judgment to be passed upon them at injunction proceedings because of conflicting evidence was held to necessitate the denial of an injunction restraining a State Commission from enforcing a rate order in view of the fact that the alleged loss of revenues would be so small as to be uncollectible. Cambridge Electric Light Co. v. Atwill (U. S. Dist. Ct.) 253.

6. The possibility of loss of a relatively small amount is not of itself sufficient reason for a temporary injunction interfering with a state action in a state field. Cambridge Electric Light Co. v. Atwill (U. S. Dist. Ct.) 253.

7. It is the duty of the Federal Court to issue an injunction against the State Commission where there is a clear showing that rates ordered by the latter are confiscatory, notwithstanding the fact that a state statute allows an appeal to the supreme court of the state from the order of the State Commission. Los Angeles R. Corp. v. California R. Commission (U. S. Dist. Ct.) 584.

8. The Federal Court has power to issue an injunction against a State Commission's orders regulating the rates of a utility having a franchise with a city where the contractual relationship between the city and the utility had been terminated by provision of the State Constitution granting the Commission the entire control over utility rates, thereby superseding the right of the city in this respect. Los Angeles R. Corp. v. California R. Commission (U. S. Dist. Ct.) 584.

9. The Federal Court will not interfere with the orderly processes of the State Commission, acting under state laws in order that certain trains alleged to be engaged in interstate commerce, shall not be discontinued until the latter body has had an opportunity to investigate the matter fully and to reach a conclusion thereon. St. Louis-S. F. R. Co. v. Alabama Pub. Service Commission (U. S. Dist. Ct.) 613.

10. An injunction by Federal Court will not be granted on the grounds of apprehension rather than an actual wrong already done to the plaintiff or imminently threatened unlawful injury by the state, since the state authorities will not be presumed to intend to exceed their powers or to act unlawfully. St. Louis-S. F. R. Co. v. Alabama Pub. Service Commission (U. S. Dist. Ct.) 613.

INTANGIBLE PROPERTY.

Expert's testimony of intangible values, see EVIDENCE, 3.

Valuation of, see VALUATION, 55-75.

INTERCORPORATE RELATIONS.

Operation of motor vehicles by railroads and their subsidiaries, see AUTOMOBILES, 2.

Matters pertaining to consolidation, merger, and sale, see CONSOLIDATION, MERGER, AND SALE.

P.U.R.1928E.

INTERCORPORATE RELATIONS—*continued.*

1. Where an unlawful monopolistic result is found to exist by the use of a device which gives control over the use of public space to those who admittedly own the grain stored therein, a liberal construction of statute in favor of the public, disregarding the corporate fiction should be employed in the determination as to whether such device for control is, in fact, operation in such space. *Re Board of Trade Warehouse Corp.* (Ill.) 65.

2. Participation as directors of a warehouse corporation by owners of interest in grain, which permits the combination of a majority of such directors, for their mutual private benefit, is the "operation" of a warehouse by persons having an interest in commodities stored therein within the meaning of a statutory prohibition against such operation. *Re Board of Trade Warehouse Corp.* (Ill.) 65.

3. Money collected from prospective patrons for connection of electric extensions should be held and credited to the company with whose lines the connections are to be made, and any other company collecting such funds should be made to account to the responsible company for all charges so collected. *Re Rush County Power Co.* (Ind.) 670.

INTEREST ON CONSTRUCTION.

Treatment of overheads in valuation, see **VALUATION**, 20-36.

INTEREXCHANGE SERVICE.

Establishment of free interexchange telephone service, see **RATES**, 35.

INTERSTATE COMMERCE.

Necessity of granting certificate for interstate airplane service upon condition of compliance with state regulations, see **CERTIFICATES OF CONVENIENCE AND NECESSITY**, 3.

Confiscation in violation of Constitution, see **CONSTITUTIONAL LAW**.

Denial of injunctive relief against Commission refusing to authorize interstate motor carriers, see **INJUNCTION**, 2.

1. The fundamental law of the nation, which is the supreme law of the land, vests exclusive jurisdiction over interstate commerce in the national government. *Hi-Ball Transit Co. v. Texas R. Commission* (U. S. Dist. Ct.) 103.

2. A railroad movement inherently intrastate in character cannot be converted into an interstate movement for the purpose of evading state regulation by the simple subterfuge of extending the operation the operation a few miles over the line of an adjoining state. *St. Louis-S. F. R. Co. v. Alabama Pub. Service Commission* (U. S. Dist. Ct.) 613.

3. A state law requiring that the Commission be advised of any proposed change seriously affecting transportation, even though in interstate commerce, is well within the police power of the state, and is to be exercised for the benefit of the traveling public, with due regard to the rights of the utility to be free from confiscation. *St. Louis-S. F. R. Co. v. Alabama Pub. Service Commission* (U. S. Dist. Ct.) 613.
P.U.R.1928E.

INTERURBAN RAILWAYS.

Relationship of interurban railway to railroad, see **RAILROADS**, 5.

JOINT CONSTRUCTION.

Treatment of overheads in valuation, see **VALUATION**, 20-36.

JUDICIAL NOTICE.

Judicial notice by Commission of location of certain city streets and of traffic conditions in petition for authority to abandon street car lines, see **COMMISSIONS**, 4.

JURISDICTION.

Of Commissions generally, see **COMMISSIONS**.

Of Commissions over certificates of convenience and necessity, see **CERTIFICATES OF CONVENIENCE AND NECESSITY**, 14-16.

Of Commissions over rates, see **RATES**, 4-8.

Of Commissions over reparation, see **REPARATION**, 1, 2.

Of Commissions over service, see **SERVICE**, 1-7.

LABOR.

Lack of Commission power to determine conditions upon which street railway's striking employees should return to work, see **COMMISSIONS**, 19.

Treatment of overheads in valuation, see **VALUATION**, 20-36.

LAND.

Percentage allowed for depreciation based upon property excluding land, see **DEPRECIATION**, 25, 26.

LARGE CONSUMERS.

Special rate for large consumers as discriminatory, see **DISCRIMINATION**, 7.

LAW.

See **CONSTITUTIONAL LAW**; **ORDINANCES**; **STATUTES**.

LEASES.

Treatment of, in valuation, see **VALUATION**, 69.

LEGAL EXPENSE.

Treatment of overheads in valuation, see **VALUATION**, 20-36.

LEGISLATURE.

Lack of Commission authority to determine wisdom of legislative act, see **COMMISSIONS**, 1.

LICENSES.

License to construct and operate electric plant, see **SERVICE**, 13.

P.U.R.1928E.

LIFE TABLES.

Use of life tables in determining depreciation of water pipes, see DEPRECIATION, 5.

LISTING.

Accidental errors in telephone directory listing as not basis for claim for unlawful discrimination, see DISCRIMINATION, 4.
Special reference directory listing for physicians, see RATES, 34.

LITIGATION.

Treatment of expense of rate cases, see RETURN, 7, 9, 10.

LOAD FACTOR.

Load factor in water rate schedule, see RATES, 40, 41.

LOCAL CONSENT.

Consent of local authority to construction and operation of gas transmission system, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 11.

LONG DISTANCE SERVICE.

Apportionment questions generally, see APPORTIONMENT.

LOSSES.

Loss in distribution as a charge to expenses of natural gas company, see RETURN, 11.

MAINS AND PIPES.

Use of life tables in determining depreciation of water pipes, see DEPRECIATION, 5.
Sample of water from company's main as evidence of poor quality, see EVIDENCE, 2.
Loss in distribution as a charge to expenses of natural gas company, see RETURN, 11.

MAINTENANCE.

Inadvisability of distinguishing between depreciation and maintenance, see DEPRECIATION, 3.
Annual allowance for repairs, maintenance, and depreciation of telephone property, see DEPRECIATION, 17.
Excessive maintenance cost of deficient equipment, see RETURN, 8.

MANAGEMENT.

Commission powers over managerial questions relating to improvements, see COMMISSIONS, 2.

P.U.R.1928E.

MANAGEMENT—continued.

Commission, in passing upon proposed relocation of track by interstate railroad, as lacking authority to compel relocation at grade which in the judgment of the company will hamper efficiency, see COMMISSIONS, 7.

Maryland statutes as not substituting Commission for directors and officers of corporation in the management and operation of railroad, see COMMISSIONS, 9.

Advantages of consolidation of gas and electric companies, see CONSOLIDATION, MERGER, AND SALE, 5.

Right of return as affected by quality of management, see RETURN, 16.

MARKET VALUE.

Evidence as to market value of utility property which is merely cumulative of like evidence introduced in original proceedings as objectionable, see EVIDENCE, 10.

MATERIALS AND SUPPLIES.

Treatment of working capital generally, see VALUATION, 49-54.

MEASURES OF VALUE.

Measures of value for rate making, see VALUATION, 11-16.

MERGER.

See CONSOLIDATION, MERGER, AND SALE.

MESSAGES.

Record of unanswered calls, see SERVICE, 45.

METERS.

Billing on basis of check meter readings where service has been tampered with in the past, see PAYMENT, 1.

Meter rates, see RATES, 23, 24.

Minimum charge for water service, see RATES, 36-39.

Application of minimum charge to more than one premises supplied through same meter, see SERVICE, 34.

MILLING IN TRANSIT.

Grain milling and storage in transit, see SERVICE, 41.

MINIMUM CHARGE.

Minimum charge for water service, see RATES, 36-39.

Application of minimum charge to more than one premises supplied through same meter, see SERVICE, 34.

P.U.R.1928E.

MISREPRESENTATION.

Water company upon resuming service after justifiable discontinuance because of misrepresentation by patrons as not to make additional charge except sufficient to cover loss sustained, see **FINES AND PENALTIES**, 2.

Discontinuance of service because of misrepresentation in application or for wasting water, see **SERVICE**, 35.

MONOPOLY AND COMPETITION.

Commission as not justified in permitting electric company to serve competitive territory in proceeding in which complaint is made against rates of existing utility, see **CERTIFICATES OF CONVENIENCE AND NECESSITY**, 9.

Lack of necessity for providing competition in consolidation plan in view of continuing regulation, see **CONSOLIDATION, MERGER, AND SALE**, 7.

Plan for grain monopoly as inconsistent with public policy established by Illinois Constitution, see **CONSTITUTIONAL LAW**, 1.

Liberal construction of statute in favor of public, disregarding corporate fiction, where unlawful monopolistic result is found to exist by use of device which gives control over use of public space to those who admittedly own the grain stored therein, see **INTER-CORPORATE RELATIONS**, 1.

Right of street railway to reasonable return irrespective of attitude of competing company, see **RATES**, 18.

Duty to serve competitor, see **SERVICE**, 8, 9.

Telephone company as not required to invade territory of neighboring company, see **SERVICE**, 17.

Refusal of service to territory in which independent company not a public utility is operating, see **SERVICE**, 19.

Statement that the introduction of automotive transportation on a large scale in this country has caused a loss in railroad patronage running as high as from 30 to 40 per cent during the last ten years, p. 497.

Discussion of the means taken by railroads to cope with automotive competition, p. 497.

Review of decisions favoring the policy of protection to existing carriers as long as they stand ready, willing, and able to give the public the service needed, p. 500.

Discussion of the respective monopolistic rights of railroads and motor utilities, giving consideration to the investment in each, p. 541.

Discussion of the right of a Commission to establish a public policy in the absence of specific statutory authority, p. 545.

1. The Motor Carrier Act of Alabama does not give the Commission of that state authority to grant a certificate to any motor carrier vesting in him the exclusive right to operate over any route. *Re Central of Georgia Motor Transport Co. (Ala.)* 535.

2. The Commission will not, except under the most unusual circumstances, permit an existing public utility which has not done its duty to P.U.R.1928E.

MONOPOLY AND COMPETITION—*continued.*

the public to keep its field to itself by agreeing that it will henceforth improve its service or lower its rates, or in any other respect comply with its full duty to the public. *Re Truckee River Power Co. (Cal.) 83.*

3. The Commission does not feel any obligation resting upon it to protect the investment of a utility which is not doing its full duty to the public. *Re Truckee River Power Co. (Cal.) 83.*

4. The Commission will not refuse to authorize additional service over a route inadequately served because of the mere probability and promise of the existing operator to purchase adequate facilities in the future, especially where ample opportunity has been afforded in the past and he has not done so. *Re Craig (Colo.) 60.*

5. A certificate will be granted authorizing additional service where the inadequacy and unsatisfactory nature of existing service is of a fundamental nature. *Re Craig (Colo.) 60.*

6. The solicitation and advertisement for passengers by a bus operator on railroad premises was held to be improper and the operator was ordered to refrain from such practices and to see that his employees did likewise. *Re Craig (Colo.) 60.*

7. Additional service was authorized over a route where existing service by passenger cars was inadequate to take care of hauling freight and express exceeding 25 pounds, leaving the other type of business to be carried on by the original operator. *Re Craig (Colo.) 60.*

8. The Commission will permit a telephone utility able and willing to furnish long distance service to enter and furnish the same to a territory, where an existing utility refuses because an independent nonutility is furnishing a limited service. *Re Darnielle (Idaho) 211.*

9. A long distance telephone company was permitted to enter and serve a patron having a store in which the instrument of a nonutility mutual company was installed, where the local utility refused service in premises having the mutual service. *Re Darnielle (Idaho) 211.*

10. A plan for the leasing of all grain housing space in a certain district by a corporation having directors who are members of the Board of Trade, for public use, reserving the privilege to private lessors to store their own grain, is not illegal because of the fact that the directors may have an interest in the private space to be so converted, but is unlawful where they have an interest in the grain in the public bins over which they have control. *Re Board of Trade Warehouse Corp. (Ill.) 65.*

11. It is illegal for any owner of grain whether or not he be the owner of a private grain elevator converted into public space, to operate public space wherein his grain is stored. *Re Board of Trade Warehouse Corp. (Ill.) 65.*

12. The machinery of an absolute monopolistic control of public warehouse space in the Chicago area would be created where the Board of Trade have exclusive power to license class "A" warehouses vitally affecting the future grain trading of the nation, and where the directors of such Board control the voting stock of a corporation having absolute power over the operation of all such storing space. *Re Board of Trade Warehouse Corp. (Ill.) 65.*

P.U.R.1928E.

MONOPOLY AND COMPETITION—*continued.*

13. The use of the machinery of monopolistic control should be carefully circumscribed to prevent abuse, notwithstanding the creation of the possibility for such machinery by legislative acts. *Re Board of Trade Warehouse Corp.* (Ill.) 65.

14. It is the duty of the Commission to prevent as far as possible the duplication of facilities and economic loss resulting from permitting motor transportation by independent companies to be inaugurated in territory competitive with existing carriers. *Re Chicago & J. Transp. Co.* (Ill.) 481.

15. An electric utility was given permission to reduce its rates as low as those charged by a municipal utility operating in the same city in order to cope with competitive rate cutting by the latter, pending a determination and a motion for rehearing by the supreme court of the state of a decision holding that the Commission had no authority to regulate the rates of a municipal plant. *Logan City v. Utah Power & Light Co.* (Utah) 57.

MOTION PICTURE FILM.

Transportation of motion picture film as public utility service, see PUBLIC UTILITIES, 1.

MUNICIPALITIES.

Consent of local authority to construction and operation of gas transmission system, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 11.

Power of state to relieve utility from gross receipts tax provision of municipal ordinance, see COMMISSIONS, 15.

Free service to municipality as discriminatory, see DISCRIMINATION, 6. Franchises generally, see FRANCHISES.

Powers over rates, see RATES, 9.

Uniform electric rates in city and suburban areas, see RATES, 13.

Necessity of municipal consent to discontinuance of service on interurban railway, see SERVICE, 5.

Presumption that municipal officers will deal fairly with street railway company in matter of resurfacing street, see STREET RAILWAYS, 2.

MUNICIPAL PLANTS.

Denial of application by water company controlled by municipal corporation to issue bonds as private corporation, see SECURITY ISSUES, 3.

1. A municipality acting in its proprietary capacity as the operator of a public utility in another municipality accepts thereby an indeterminate permit subject to all the limitations, restrictions, and regulations imposed by law upon the holder of such a permit in the same degree as a private corporation under like circumstances. *Minocqua v. Eagle River* (Wis.) 208.

2. A municipality acting in its proprietary capacity as the operator of a public utility in another municipality is subject to the statutory rights of the latter to condemn its property for public use. *Minocqua v. Eagle River* (Wis.) 208.

P.U.R.1928E.

MUTUAL COMPANIES.

Refusal of service to territory in which independent company not a public utility is operating, see SERVICE, 19.

NATIONAL ELECTRICAL SAFETY CODE.

Requirement that company comply with provisions of National Electrical Safety Code before collecting for further extensions, see ELECTRICITY, 1.

NATURAL GAS.

Relief of natural gas utility from payment of gross receipts tax under franchise provision, see FRANCHISES, 3.

Whether pipe line company supplying wholesale gas to distributing corporation is a public utility as not an issue in rate proceedings of distributing company, see PUBLIC UTILITIES, 3.

Allowance for amortization of gas generating plant rendered nonoperative by substitution of natural gas supply, see RETURN, 4.

Loss in distribution as a charge to expenses of natural gas company, see RETURN, 11.

Specific amounts allowed for return of public utility companies, see RETURN, 19-29.

NONOPERATIVE PROPERTY.

Valuation of tangible property generally, see VALUATION, 42-48.

NONPHYSICAL ELEMENTS.

Nonphysical elements affecting value, see VALUATION, 20-40.

NOTES.

Present owners of premises to which utility has constructed line and stands ready to serve as under no contractual obligation to pay for installation as condition of receiving service, notwithstanding rule relating to former owner who has defaulted in payment of note, see SERVICE, 11.

NOTICE.

Waiver of notice of hearing, see PROCEDURE, 2.

NUISANCE.

Lack of Commission jurisdiction to eliminate undue congestion on sidewalk in front of business houses caused by patrons waiting at terminal of street railway, see COMMISSIONS, 17.

OBSOLESCENCE.

Deduction because of unusual obsolescence, see VALUATION, 19.

OFF-PEAK SERVICE.

Off-peak lighting service, see RATES, 26.

P.U.R.1928E

OMISSIONS AND CONTINGENCIES.

Treatment of overheads in valuation, see **VALUATION**, 20-36.

ONE-MAN CARS.

Adequacy and safety of one-man cars on cross-town lines, see **SERVICE**, 42.

OPERATING EXPENSES.

Operating expenses and other deductions from gross revenues, see **RETURN**, 4-15.

Practice considered in allowing for working capital, see **VALUATION**, 49-54.

ORDERS.

Commission jurisdiction to issue preliminary order, see **CERTIFICATES OF CONVENIENCE AND NECESSITY**, 14.

Evidence on complaint against discontinuance of spur track without Commission authority, see **EVIDENCE**, 1.

1. A Commission order recognizing the existence of free telephone service between certain points cannot be construed as an order directing that such service should continue to exist. *Dearborn v. Midwest Teleph. Co.* (Mo.) 175.

ORDINANCES.

Authority to exercise franchise powers given in ordinance which also specifies rates to be charged upon condition that utility waive any rights to charge such rates without approval of Commission, see **CERTIFICATES OF CONVENIENCE AND NECESSITY**, 2.

Power of state to relieve utility from gross receipts tax provision of municipal ordinance, see **COMMISSIONS**, 15.

Order that street railway obey ordinance requiring raising of tracks to conform with level of street or have its indeterminate permit revoked, see **FRANCHISES**, 2.

Construction of ordinance relating to rates, see **RATES**, 5.

Franchise ordinances fixing rates, see **RATES**, 19-21.

Financial embarrassment of street railway company as no defense to ordinance requiring raising tracks to conform with new level in street which is to be repaved, see **STREET RAILWAYS**, 1.

ORGANIZATION.

Exclusion of organization and franchise items in making up depreciable property, see **DEPRECIATION**, 4.

Approval of securities proposed by electric company guilty of irregular and improper methods of collecting connection charges, see **SECURITY ISSUES**, 4.

ORIGINAL COST.

Cost of property as only reasonable basis for depreciation, see **DEPRECIATION**, 10.

P.U.R. 1928E.

ORIGINAL COST—*continued.*

Methods and measures used in determining value generally, see **VALUATION**, 3-10.

Measures of value for rate making, see **VALUATION**, 11-16.

Refusal of deduction from original cost appraisal for balance that may be in depreciation reserve, see **VALUATION**, 18.

Going value as independent of original cost, see **VALUATION**, 60.

OUTLETS.

Connected load count of socket outlets under electric rate schedules, see **RATES**, 29.

Minimum charge for water service, see **RATES**, 36-39.

OVERCAPITALIZATION.

Treatment of excessive purchase price in consolidation proceedings, see **CONSOLIDATION, MERGER, AND SALE**, 3.

OVERCHARGES.

Reparation for overcharges, see **REPARATION**.

OVERHEADS.

Treatment of, in valuation, see **VALUATION**, 20-36.

Refusal of allowance for going value where overheads have been allowed elsewhere, see **VALUATION**, 65, 66.

OWNERS.

Present owners of premises to which utility has constructed line and stands ready to serve as under no contractual obligation to pay for installation as condition of receiving service, notwithstanding rule relating to former owner who has defaulted in payment of note, see **SERVICE**, 11.

PARTIES.

1. A voluntary body composed of individuals joined together for the alleged purpose of protecting the interest of small consumers in the development of the remaining water power resources of the state, and to secure more effective regulations of light and power rates was held to have no more power or authority to participate in a consolidation proceeding between a city gas and electric company than its individual members, and, therefore, not to be an interested person. Re Consolidated Gas Co. (N. Y.) 478.

PAVING.

Financial embarrassment of street railway company as no defense to ordinance requiring raising of tracks to conform with new level in street which is to be repaved, see **STREET RAILWAYS**, 1.

Presumption that municipal officers will deal fairly with street railway company in matter of resurfacing street, see **STREET RAILWAYS**, 2.
P.U.R.1928E.

PAYMENT.

Present owners of premises to which utility has constructed line and stands ready to serve as under no contractual obligation to pay for installation as condition of receiving service, notwithstanding rule relating to former owner who has defaulted in payment of note, see SERVICE, 11.

1. An electric company properly rendered bills based on a reading from a check meter located outside of the premises occupied by a patron, himself a practicing electrician, whose service meter had on previous occasions given evidence of tampering or by-passing. Gould v. Public Service Electric & Gas Co. (N. J.) 321.

2. A public service corporation is entitled to discontinue service to a customer's present premises because of prior indebtedness of the latter at other premises, where the statute permitting such discontinuance does not limit the company's right to a particular building or premises. Clark v. Utica Gas & E. Co. (N. Y. App. Div.) 657.

PENALTIES.

See FINES AND PENALTIES.

PHYSICAL CONNECTION.

Commission jurisdiction over apportionment of expense of physical connection, see COMMISSIONS, 20.

PHYSICIANS' EXCHANGE.

Special reference directory listing for physicians, see RATES, 34.

PIPE LINE COMPANIES.

Whether pipe line company supplying wholesale gas to distributing corporation is a public utility as not an issue in rate proceedings of distributing company, see PUBLIC UTILITIES, 3.

PLEADING.

Statutory jurisdiction of Commission to investigate reasonableness of rates aside from filing of complaints or protests, see RATES, 6.

1. Informal complaints although not couched in precise legal language, but sufficient to apprise the Commission that the complainant regards a utility's rates as unreasonably high, are sufficient to meet the requirements of statute having to do with complaints against utility rates. Re Great Falls Gas Co. (Mont.) 803.

2. Motions to strike unnecessary or objectionable allegations in a complaint, which on the whole gives to the court an understanding of the material facts and conditions upon which the plaintiff rests its contention of infringement of its constitutional rights, will be overruled. Los Angeles R. Corp. v. California R. Commission (U. S. Dist. Ct.) 584. P.U.R. 1928E.

POWERS.

- Of Commissions generally, see **COMMISSIONS**.
- Of Commissions over rates, see **RATES**, 4-8.
- Of municipalities over rates, see **RATES**, 9.
- Of Commissions over service, see **SERVICE**, 1-7.

PREFERENCES.

See **DISCRIMINATION**.

PRELIMINARY ORDER.

Commission jurisdiction to issue preliminary order, see **CERTIFICATES OF CONVENIENCE AND NECESSITY**, 14.

PREMISES.

Application of minimum charge to more than one premises supplied through same meter, see **SERVICE**, 34.

PRESUMPTIONS.

Presumption in favor of Commission order on appeal, see **APPEAL AND REVIEW**.

PRICE INDEX.

Methods and measures used in determining value generally, see **VALUATION**, 3-10.

PROCEDURE.

Commission as not justified in permitting electric company to serve competitive territory in proceeding in which complaint is made against rates of existing utility, see **CERTIFICATES OF CONVENIENCE AND NECESSITY**, 9.

Complaint of city seeking extension of exchange boundaries as not to be prejudiced by granting in another proceeding authorization to purchase stock of utility involved, see **CONSOLIDATION, MERGER, AND SALE**, 1.

Notice of hearing in compliance with constitutional requirements, see **CONSTITUTIONAL LAW**, 2.

Stay of proceedings in state court against utility pending determination in Federal Court of petition for voluntary bankruptcy as automatically ineffective and properly vacated upon dismissal of bankruptcy petition, see **INJUNCTION**, 1.

Whether pipe line company supplying wholesale gas to distributing corporation is a public utility as not an issue in rate proceedings of distributing company, see **PUBLIC UTILITIES**, 3.

Denial of rate reduction unless there is evidence that will permit reasonable determination as to advisability of such action, see **RATES**, 1.

Disapproval of immediate ex parte reduction in domestic lighting rates as part of proposed consolidation program, see **RATES**, 2.

P.U.R.1928E.

PROCEDURE—*continued.*

Statutory jurisdiction of Commission to investigate reasonableness of rates aside from filing of complaints or protests, see **RATES**, 6.

Statement that the term "public hearing" does not mean that all persons, whether or not they have anything germane to offer, are entitled to be heard at length in a proceeding, p. 44.

1. A proposal by a street railway at a Commission hearing for the purpose of considering changes in existing route and transfer arrangements between bus and traction lines, that the current free transfer arrangement be abolished and a 10-cent fare on the bus line authorized, as well as a 2-cent transfer charge from rail to bus was held not to be properly before the Commission inasmuch as no application for increase in fare had been received, and proper notice scheduling a hearing did not state that increased fares would be considered. *Re Washington-Interurban R. Co. (D. C.)* 712.

2. All objections as to the adequacy of legal notice of a Commission hearing are effectively waived by a utility by the appearance of counsel requesting a continuance. *Re Great Falls Gas Co. (Mont.)* 803.

3. Rate-making proceedings will not be open for the purpose of allowing the losing side to introduce an entirely new and different rate base. *Re Rock Hill Teleph. Co. (S. C.)* 221.

4. Rate-making proceedings will not be reopened where the new evidence proposed to be introduced could not change the result of the vote already taken by the Commission, but where, on the other hand, the same result would probably be reached. *Re Rock Hill Teleph. Co. (S. C.)* 221.

PROMOTIONAL RATES.

Promotional electric rates, see **RATES**, 25.

PROMOTION FEES.

Treatment of overheads in valuation, see **VALUATION**, 20-36.

PROPERTY NOT OWNED.

Valuation of tangible property generally, see **VALUATION**, 42-48.

PROPERTY OWNERS.

Lack of Commission authority to compel relocation of tracks for benefit of local property owners, see **COMMISSIONS**, 7.

Fact that railroad is required to secure consent of Commission to relocation of track as not warranting arbitrary withholding of approval for benefit of private property holders, see **COMMISSIONS**, 10.

PUBLIC INTEREST.

Meaning of public interest, see **PUBLIC UTILITIES**, 2.

PUBLIC UTILITIES.

Determination of charter rights of corporation applying for certificate as a judicial question not within Commission jurisdiction, see **COMMISSIONS**, 3.

P.U.R.1928E.

PUBLIC UTILITIES—*continued.*

Lack of Commission power to interfere with corporate act or policy which will not in some manner adversely affect public interest in rates or service, see COMMISSIONS, 8.

Franchises generally, see FRANCHISES.

Relations between corporations, see INTERCORPORATE RELATIONS.

Denial of application by water company controlled by municipal corporation to issue bonds as private corporation, see SECURITY ISSUES, 3.

Commission as not to determine whether utility district has complied with all requirements of law in organization, see SERVICE, 1.

Annotation on public utilities generally, p. 249.

Annotation on what constitutes a public utility, p. 249.

Annotation on contract carriers as public utilities, p. 251.

Annotation on what constitutes public service, p. 252.

Annotation on corporate status of public utilities, p. 253.

1. A motor vehicle operator indiscriminately serving the whole film exhibiting public and delivering exchange motion picture films between the various theaters in different communities was held to be a common carrier within the meaning of a law requiring certificates of public convenience and necessity for common carrier operation by motor. *Re Exhibitors Film Delivery & Service Co. (Colo.)* 623.

2. The statutory meaning of "public interest" must vary to some extent with the character of the utility and will be narrower when applied to the utilities having localized functions such as water, light, and gas supply than in the case of railroads affecting service to the whole public. *West v. Philadelphia, B. & W. R. Co. (Md. Ct. App.)* 139.

3. Whether or not a pipe line company supplying wholesale gas to a distributing public service corporation is a public utility, cannot be made an issue in rate proceedings of the distributing utility, and its status can only be determined in a proper proceeding. *Re Great Falls Gas Co. (Mont.)* 803.

4. Under our Constitution and statutes telephone companies are "common carriers." *Farmers' & Merchants' Teleph. Co. v. Orleans Community Club (Neb. Sup. Ct.)* 787.

5. The state-owned mill and elevator, together with the equipment, trackage, and other facilities thereof in Grand Forks, North Dakota, is in law and fact a "public terminal grain elevator and subject to regulation as such." *State v. Great Northern R. Co. (N. D. Sup. Ct.)* 111.

6. A company which agrees to pick up and deliver freight, leases, or hires its equipment, or hires the owners of equipment, which includes the use of their equipment, is, in so far as it holds itself out to serve the shipping public, even though it attempts to restrict its activities to a selected type of business, a motor transportation company within the definition of statutes requiring Commission authority for such operation. *Northern Ohio Power & Light Co. v. Motor Freight (Ohio)* 609.

7. The test which determines whether or not a given operator is a motor transportation company, can never be one which hinges solely upon P.U.R.1928E.

PUBLIC UTILITIES—*continued.*

the ownership or lack of ownership of vehicles in which freight is carried. Northern Ohio Power & Light Co. v. Motor Freight (Ohio) 609.

8. A street railway company is a public service corporation owing its existence to the governmental power of eminent domain, and charged with the duty of so maintaining and conducting the enterprise in the interest of the public, subject to the control of the proper authorities in the matter of conducting their properties, as well as in the remuneration to be received therefor. Columbia R. Gas & E. Co. v. South Carolina (U. S. C. C. A.) 235.

PURCHASE PRICE.

Duty of Commission with regard to excessive purchase price in granting certificates of convenience and necessity, see **CERTIFICATES OF CONVENIENCE AND NECESSITY**, 15.

Treatment of excessive purchase price in consolidation proceedings, see **CONSOLIDATION, MERGER, AND SALE**, 3.

Purchase price of controlling stock as a charge to capital, see **VALUATION**, 41.

RAILROADS.

Right of railroad to operate motor vehicles, see **AUTOMOBILES**, 1.

Commission power to issue certificate to railroad company or its subsidiary for motor carrier operation, see **CERTIFICATES OF CONVENIENCE AND NECESSITY**, 1.

Commission powers over managerial questions relating to improvements, see **COMMISSIONS**, 2.

Commission, in passing upon proposed relocation of track by interstate railroad, as lacking authority to compel relocation at grade which in the judgment of the company will hamper efficiency, see **COMMISSIONS**, 7.

Maryland statutes as not substituting Commission for directors and officers of corporation in the management and operation of railroad, see **COMMISSIONS**, 9.

Fact that railroad is required to secure consent of Commission to relocation of track as not warranting arbitrary withholding of approval for benefit of private property holders, see **COMMISSIONS**, 10.

Railroad crossings generally, see **CROSSINGS**.

Evidence on complaint against discontinuance of spur track without Commission authority, see **EVIDENCE**, 1.

Interstate and intrastate activities of railroads, see **INTERSTATE COMMERCE**, 2, 3.

Railroad rates generally, see **RATES**, 31.

Necessity of Commission consent to discontinuance of branch line, see **SERVICE**, 4.

Substitution of motor vehicles for railroad service, see **SERVICE**, 31, 32.

Railroad service generally, see **SERVICE**, 40, 41.

1. A railroad company compelled to relocate tracks because of public construction, such as a power dam, is entitled to establish them on a new P.U.R.1928E.

RAILROADS—*continued.*

location at a grade as advantageous as that which it has been forced to abandon, or at least as far as that may be practical. *West v. Philadelphia, B. & W. R. Co.* (Md. Ct. App.) 139.

2. Authorization was given to the purchaser of a portion of a railroad not in operation for ten years to junk and remove ties, tracks, bridges, and other equipment where there was no likelihood of public necessity ever requiring continuation of operation of such lines and where no objection was made by civil and judicial authorities in the area affected. *Re Cayce* (Mo.) 316.

3. A statute providing certain overhead railroad clearance except where "impracticable" was construed to have been passed with the intention of exempting such overhead structures as were not passed by locomotive power, but under which cars were passed by pinch-bars thereby avoiding the necessity of employees riding on car roofs. *Re Pickering Coal Co.* (Mo.) 526.

4. The Board of Railroad Commissioners of the state of North Dakota has the power and authority to determine when and where such service [milling, stoppage, cleaning, mixing, and storing grain in transit] shall be rendered, and the duty of determining primarily what is an adequate compensation therefor. *State v. Great Northern R. Co.* (N. D. Sup. Ct.) 111.

5. A traction company operating over about 20 miles of electric trolley lines in and about a metropolitan area of a particular city and neighboring communities was held to partake more of the nature of a railroad than that of a simple street railway serving one community in so far as the Federal Bankruptcy Act excludes railroads from taking advantage of its provisions. *Columbia R. Gas & E. Co. v. South Carolina* (U. S. C. C. A.) 235.

RATES.

- I. In general, 1-3.
- II. Jurisdiction, powers, and duties of Commissions, 4-8.
- III. Powers of municipalities, 9.
- IV. Reasonableness, 10-18.
- V. Contract rates, 19-21.
- VI. Schedules, 22.
- VII. Meter rates, 23, 24.
- VIII. Rates of particular utilities, 25-42.
 - a. Electric, 25-30.
 - b. Railroad, 31.
 - c. Street railway, 32.
 - d. Telephone, 33-35.
 - e. Water, 36-42.

I. In general.

Authority to exercise franchise powers given in ordinance which also specifies rates to be charged upon condition that utility waive any rights to charge such rates without approval of Commission, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 2.

P.U.R.1928E.

RATES—*continued.*

- Lack of necessity for consolidating companies to compute in advance exact amount of rate reduction to be expected from economies, see **CONSOLIDATION, MERGER, AND SALE**, 9.
- Discrimination in rates, see **DISCRIMINATION**.
- Admissibility of audit covering telephone operation in rate investigation, see **EVIDENCE**, 6-8.
- Inadmissibility of evidence as to the validity of past rate schedule not under attack, see **EVIDENCE**, 9.
- Injunction against rate order on the ground of confiscation, see **INJUNCTION**.
- Rate cutting between electric utility and municipal electric plant, see **MONOPOLY AND COMPETITION**, 15.
- Sufficiency of complaint in rate proceeding, see **PLEADINGS**.
- Rehearing of rate proceeding, see **Procedure**, 3, 4.
- Treatment of expense of rate cases, see **RETURN**, 7, 9, 10.

Annotation on regulation of rates by various authorities, p. 195.

Statement that it is rarely advisable to form an opinion of a utility's financial condition or possibilities on the results of a period less than one year, p. 39.

1. No reduction will be made in the rates of a utility unless there is ample evidence before the Commission that will permit of a reasonable determination as to the advisability of such action. *Cripple Creek v. Cripple Creek Water Co.* (Colo.) 388.
2. An ex parte and immediate reduction in domestic lighting rates as part of a proposed consolidation program between a gas and an electric company was disapproved in view of the necessity in such event of draining reserves, reducing dividends, the inadequate period upon which rate observations were based, as well as the resulting discrimination to power users. *Re Consolidated Gas Co.* (N. Y.) 19.
3. A reduction in electric rates believed by the Commission to its own satisfaction to be justified was not refused pending an opportunity for final valuation of utility property. *Re Madison Gas & E. Co.* (Wis.) 601.

II. Jurisdiction, powers, and duties of Commissions.

4. The Commission has the power (Public Utilities Act, § 63b) either upon complaint or upon its own motion to determine whether or not rates reduced by carriers are reasonable and compensatory. *Bay and River Boat Owners' Asso. v. Anderson* (Cal.) 86.
5. A definite statement in one section of an ordinance that certain rates specified in two other particular sections of the same should be subject to the regulation of the Commission, presumably does not apply to rates also fixed in the first section itself. *Re Arvada Electric Co.* (Colo.) 471.
6. A Commission has statutory jurisdiction to investigate the reasonableness of utility rates regardless and apart from any jurisdiction conferred by the filing of complaints or protests. *Re Great Falls Gas Co.* (Mont.) 803.
7. The establishment of initial rates, although a function of management, does not preclude the subsequent right of the Commission to revise P.U.R.1928E.

RATES—*continued.*

or restrain such rates after proper investigation. *Re Great Falls Gas Co.* (Mont.) 803.

8. Rates fixed by franchise contract providing that they shall not be changed without consent of the municipality are nevertheless subject to the police power of the state to regulate unreasonableness in rates, where the contract was executed subsequent to a statute delegating the exercise of such state powers to the Commission. *Re Rock Hill Teleph. Co.* (S. C.) 221.

III. Powers of municipalities.

9. A constitutional provision expressly reserving to a State Commission from the time of its creation, the entire control over rates of public utilities, operates to divest municipalities of all such powers previously exercised to control rates or to contract with respect thereto. *Los Angeles R. Corp. v. California R. Commission* (U. S. Dist. Ct.) 584.

IV. Reasonableness.

Annotation on factors affecting reasonableness of rates, p. 196.

Annotation on rate comparisons, p. 197.

10. A showing that the land in the area served by vessels has, of recent years, been farmed in relatively small tracts and the tonnage broken into small consignments requiring frequent handlings, is pertinent in a general way in a rate proceeding, but in the final analysis the financial results of operation must be given controlling weight. *Bay and River Boat Owners' Asso. v. Anderson* (Cal.) 86.

11. A section of the Public Utilities Act (§ 32) granting the Commission power to prescribe uniform rates must apply to situations where there are uniform circumstances and conditions and when the uniform rates can be made to apply to every operator performing a similar utility service in a territory involved. *Bay and River Boat Owners' Asso. v. Anderson* (Cal.) 86.

12. Where transportation services are by various methods and are totally different, no beneficial results would be secured by the establishment of uniform rates, and in the end would only restrict carriers from voluntarily changing rates, which in many cases may be justified under changing conditions. *Bay and River Boat Owners' Asso. v. Anderson* (Cal.) 86.

13. The largest city in a closely allied group of municipalities served at a uniform reasonable rate by the same electric utility was refused a request for a special reduced rate where the difference in production and distribution cost as between such city and the aggregate consumption beyond the corporate limits thereof was not sufficient to warrant an allocation of plant to any particular class. *Wichita v. Kansas Gas & E. Co.* (Kan.) 634.

14. Rates will not be declared unreasonable simply by comparison with tariffs of companies in adjoining territory, wholly disregarding any consideration of the cost of similar service in different communities, the property employed in rendering the service, amounts fixed for depreciation and return, and other factors to be given necessary consideration in the fixing of rates. *Makin v. Missouri Pub. Service Commission* (Mo.) 290.

15. Lighting rates of one city cannot be determined per se by a com.
P.U.R.1928E. 58

RATES—*continued.*

parison with the rates of another city unless all the factors affecting the costs of doing business such as local ordinances, topography, prices of supplies, and labor rates are the same. *Re Consolidated Gas Co. (N. Y.)* 19.

16. The method of basing rates on the ability of the consumers to pay or upon the consumers' desire for low rates appears to be erroneous and cannot be considered by the Department. *Department of Public Works ex rel. Asotin v. Pacific Power & Light Co. (Wash.)* 213.

17. A reduction of comparatively high electric rates was ordered by the Department notwithstanding an existing low rate of return, where the Department believed that the new business stimulated would so increase the gross revenue as not to lower the rate of return any further. *Department of Public Works ex rel. Friday Harbor v. Friday Harbor Light & P. Co. (Wash.)* 660.

18. A street railway is entitled to an adjustment of its rates where it is operating without earning a reasonable return upon the value of its properties irrespective of the attitude of a competing company, especially where the continuation of a certain fare on a newly acquired line would result in discrimination against the rest of its system. *Re Milwaukee Electric R. & Light Co. (Wis.)* 15.

V. Contract rates.

Statement that private branch stations should be counted as "stations" within the meaning of franchise purporting to fix telephone rates at or below a certain number of stations, p. 224.

19. A utility which has been given a franchise by town ordinance specifying rates to be charged stands in the same position as if the ordinance had not specified such rates, where, by its own action, no benefit has been claimed by reason of the insertion of such rates in such ordinance. *Re Arvada Electric Co. (Colo.)* 471.

20. It is the duty of the Commission to the public to take such necessary steps as will prevent rates which have been inserted in an ordinance granting a franchise from having any higher standing or securer footing than they would have if they had not been so inserted, notwithstanding the announced intention of the utility to claim no special benefit from such rates. *Re Arvada Electric Co. (Colo.)* 471.

21. It is the policy of the state, notwithstanding its power to disregard the rate-making provision contained in a franchise, never to do so unless it clearly appears that rates thereby authorized are unreasonable and confiscatory. *Re Rock Hill Teleph. Co. (S. C.)* 221.

VI. Schedules.

Discussion of the advantages of two-part rate for gas over the ordinary minimum form of rate, p. 774.

22. No schedule of rates published by a utility subsequent to the adoption of the Public Service Commission Act becomes a lawful schedule until it has the approval of the Commission. *Re Great Falls Gas Co. (Mont.)* 803.

VII. Meter rates.

23. As a general practice all customers of a water utility should be P.U.R.1928E.

RATES—continued.

metered, with the possible exception of those serviced from a small system and located on dead ended mains, particularly where the water distributed is impregnated with foreign matter which might affect the working parts of the meters. Re Cambridge (Wis.) 707.

24. Classification of water consumers as to who should and who should not receive metered service in a community with no sewer system was made by requiring meters for those customers having private sewers or other means of disposing of surplus water, as well as customers having water lifts or bath fixtures, except such of the latter as resided on dead ended mains where sluggish circulation of water impregnated with foreign substances was likely to interfere with working parts of the meters. Re Cambridge (Wis.) 707.

VIII. Rates of particular utilities.

Annotation on automobile rates, p. 198.

a. Electric.

Annotation on electric rates, p. 199.

Discussion of the advantages of various structures for domestic consumers tending to stimulate consumption by heavy duty appliances, p. 384.

Discussion of the relative merits of the Wright demand form of electric schedule with the Hopkinson schedule and the ordinary block rate and room basis, p. 605.

25. The modification of a proposed electric rate structure for domestic consumption adopted a unit of three rooms as a basis for demand count with a minimum charge for each additional room limiting the total number to be counted at ten rooms in an effort to stimulate power consumption for heavy duty appliances by the domestic class without endangering public relations. Re Alabama Power Co. (Ala.) 383.

26. A baking company was permitted to receive lighting service under a wholesale power rate where the company's schedule did not provide that the customer should take off-peak service exclusively. Horn & Hardart Baking Co. v. Public Service Electric & Gas Co. (N. J.) 513.

27. Consumption of airway beacons for the development of commercial aeronautics is so low that it does not justify making a special rate for this service where such reduction would result in losses to the company and discrimination against other consumers. Bureau of Lighthouses v. Southern Pub. Utilities Co. (N. C.) 307.

28. The power rate of an electric utility was ordered to be extended so as to include energy used for heating and refrigeration purposes in order to develop this class of service. Wauzeka Creamery Co. v. Wauzeka Light & P. Co. (Wis.) 158.

29. An agreement between an electric utility and its consumers to eliminate empty baseboard or floor sockets and the ordinary socket appliances from the connected load count was approved by the Commission as tending to reduce the number of kilowatt hours billed at rates applicable to primary and secondary blocks of energy. Re Madison Gas & E. Co. (Wis.) 601.

30. The Wright demand form of schedule was approved as adapted to give the customer with small installation the advantage to which he is en-

P.U.R.1928E.

RATES—continued.

titled as he improves the load factor of his electrical use. *Re Madison Gas & E. Co. (Wis.)* 601.

b. Railroad.

Annotation on railroad rates, p. 200.

Annotation on particular commodity tariffs of railroads, p. 202.

31. The record examined, and it is held, that the decision of the Board of Railroad Commissioners that 1 cent per hundredweight is an adequate compensation for "cleaning, mixing, and storing in transit" service, required of transportation companies at the public terminal grain elevator, is sustained by the evidence taken. *State v. Great Northern R. Co. (N. D. Sup. Ct.)* 111.

c. Street railway.

Higher fare for return trip because of transfer agreement as not unjustifiably discriminatory, see **DISCRIMINATION**, 9.

Annotation on street railway rates, p. 203.

32. Fare zones may properly be established without regard to the city limits on a street railway line to produce additional revenue, where it can be shown that the particular line is unprofitable to the extent of burdening the balance of the system. *Milwaukee v. Milwaukee Electric R. & Light Co. (Wis.)* 679.

d. Telephone.

Annotation on telephone rates, p. 205.

33. Redgrading of service is not justified in the absence of testimony by competent witnesses as to the experience of similar telephone utilities under circumstances that are similar to the circumstances and conditions in the cause at bar. *Re Decatur County Independent Teleph. Co. (Ind.)* 1.

34. A special rate somewhat less than the rate for the regular extra directory listing was allowed for "special reference listing" in connection with a "Physicians' Exchange" to be associated with the names of various physicians and surgeons of a city for the purpose of rendering 24-hour continuous service to patrons in need of medical attention. *Re Tri-State Teleph. & Teleg. Co. (Minn.)* 775.

35. The re-establishment of free telephone service between exchanges a short distance apart which had been discontinued upon the destruction of direct facilities, due to causes beyond the control of the company, was denied where the prospective revenue did not warrant an order requiring the installation of a direct line, and where there was no proof that the general public required such facilities, or that the re-establishment of such service would not result in unreasonable discrimination in favor of those who had need of it. *Dearborn v. Midwest Teleph. Co. (Mo.)* 175.

e. Water.

Annotation on irrigation rates, p. 200.

Annotation on water rates, p. 207.

36. A minimum charge for a metered water rate should be based upon the size of the meter in service, rather than upon the number of outlets on the premises to be supplied. *Parker v. St. Joseph Water Co. (Mo.)* 161. P.U.R.1928E.

RATES—*continued.*

37. Customers whose demands are greater than the average should pay a minimum charge that will reflect the difference in the expense between the large customers and the smaller customers. *Parker v. St. Joseph Water Co.* (Mo.) 161.

38. The practice of basing the minimum charge for a metered water rate on the number of outlets on the premises to be supplied was held to occasion complaint and misunderstanding and was ordered to be discontinued, and the size of the meter was used as a substitute basis. *Parker v. St. Joseph Water Co.* (Mo.) 161.

39. A rule of a water company providing for full minimum charges to premises constructed for two tenants regardless of whether one be vacated or not, was held to be unreasonable, and the company was required to file a new rule remitting the minimum or flat charge to premises vacant for a period of thirty days or more. *Parker v. St. Joseph Water Co.* (Mo.) 161.

40. Load factor should be taken into account in figuring a schedule of rates for water service where the amount of the customer's use such as that of a whole city, makes this feature an important one. *Lee's Summit v. Independence Water Works Co.* (Mo.) 184.

41. Load factor of nearly 100 per cent obtained by a city maintaining its own reservoir was taken into consideration in apportioning the fixed cost of the water company supplying such city with relation to the rest of its distribution system not having such uniform demand. *Lee's Summit v. Independence Water Works Co.* (Mo.) 184.

42. Rates to a power plant to which water was not available during several months by reason of the exhaustion of supply by other preferred classes of service were ordered to be 50 per cent less wholesale than rates for such other classes of service. *Department of Public Works ex rel. Asotin v. Pacific Power & Light Co.* (Wash.) 213.

REASONABLENESS.

Of rates, see RATES, 10-18.

Of return, see RETURN, 16-29.

REFRIGERATION.

Electric rates for heating and refrigeration, see RATES, 28.

REHEARING.

Rehearing of rate proceeding, see PROCEDURE, 3.

Granting of motion for rehearing of telephone rate proceeding where rates had been fixed by agreed valuation without actual estimate, see VALUATION, 2.

RELOCATION.

Relocation of railroad tracks, see RAILROADS, 1.

REPAIRS.

Annual allowance for repairs, maintenance, and depreciation of telephone property, see DEPRECIATION, 17.

P.U.R.1928E.

REPARATION.

1. The Commission has no power to compel a utility to make reparation and restitution to its patrons for money arbitrarily or unjustly collected. *Parker v. St. Joseph Water Co.* (Mo.) 161.

2. The Commission is without power to require a telephone company to pay rebates on tolls collected from patrons at different exchanges upon the discontinuance of free service. *Dearborn v. Midwest Teleph. Co.* (Mo.) 175.

REPEAL.

Legislation not repealed by subsequent laws relating to warehouses, see STATUTES, 1.

REPRODUCTION COST.

Methods and measures used in determining value generally, see VALUATION, 3-10.

Measures of value for rate making, see VALUATION, 11-16.

RESERVES.

Necessity for depreciation reserve, see DEPRECIATION, 7.

Purpose of depreciation reserve, see DEPRECIATION, 8, 11.

Inability to earn fair return and take care of depreciation as not excuse for failure to set aside depreciation fund, see DEPRECIATION, 9.

Refusal of deduction from original cost appraisal for balance that may be in depreciation reserve, see VALUATION, 18.

RETIREMENTS.

Retired property having overhead construction cost included in its original cost as required to carry such overhead costs along with its retirement, see VALUATION, 17.

RETURN.

I. In general, 1-3.

II. Operating expenses and other deductions from gross revenues, 4-15.

III. Reasonableness, 16-29.

a. In general, 16-18.

b. Specific amounts allowed, 19-29.

I. In general.

Allocation of gas plant between counties in confiscation case, see APPORTIONMENT, 12.

Relief of natural gas utility from payment of gross receipts tax under franchise provision, see FRANCHISES, 3.

Board as not authorized to order installation of additional equipment or facilities such as maintenance of waiting room at terminal unless revenues justify expense, see SERVICE, 6.

Matters relating to abandonment of service generally, see SERVICE, 18-30.
P.U.R.1928E.

RETURN—*continued.*

Effect of diminishing return on allowance for going value, see **VALUATION**, 61.

1. The falling off in revenue due to the vacation period at a university and a slight increase in operating expenses during the same period, owing to employees of the company being on vacations, were both taken into consideration by the Commission in arriving at the annual operating income of a telephone utility serving a university community. *Re Illinois Bell Teleph. Co. (Ill.) 279.*

2. Revenues and expenses pertaining to the publication of directories, including all advertising, are regularly reported to the Commission and the income therefrom is considered in the fixing of rates for telephone service. *Baldwin v. Chesapeake & P. Teleph. Co. (Md.) 529.*

3. Current assets offsetting the reserve for depreciation can be used temporarily for additions or extensions to fixed capital. *Wauzeka Creamery Co. v. Wauzeka Light & P. Co. (Wis.) 158.*

II. Operating expenses and other deductions from gross revenues. Revenues and expenses of telephone directories, see *supra*, 2.

Allowances for depreciation, see **DEPRECIATION**.

Annual allowance for repairs, maintenance, and depreciation of telephone property, see **DEPRECIATION**, 17.

Practice considered in allowing for working capital, see **VALUATION**, 49–54.

4. Rates should not include any amount for amortization of a gas generating plant rendered nonoperative by the substitution of a natural supply, over and above a depreciation reserve, which would have existed in a much greater amount if properly accounted for since the date of installation, and had the property been operated under one ownership since the inception of the original company. *Santa Barbara v. Southern Counties Gas Co. (Cal.) 767.*

5. The difference between the amount of plant investment rendered non-operative by substitution of service supply and an amount which should have existed in the depreciation reserve had it been properly accounted for since the date of installation, was amortized over a period of ten years on a 6 per cent sinking-fund basis. *Santa Barbara v. Southern Counties Gas Co. (Cal.) 767.*

6. Salaries for certain officials of a telephone company were thought by the Commission to be excessive and were not allowed in their full amount as proper operating expenses. *Re Decatur County Independent Teleph. Co. (Ind.) 1.*

7. Where the rates authorized in a particular proceeding are for future periods the rate case expenses of a prior cause are nonrecurring items, and are not proper items to be amortized as part of expense in the particular case and will not be allowed. *Re Decatur County Independent Teleph. Co. (Ind.) 1.*

8. Maintenance expense for a peculiar type of telephone switchboard costing five times as much as such expense for other types with bigger and P.U.R.1928E.

RETURN—continued.

better service capacity, was not allowed as an annual operating expense in excess of a reasonable figure therefor, the balance to be charged to revenues available for return. *Re Decatur County Independent Teleph. Co. (Ind.)* 1.

9. Expense of a rate proceeding by a water utility was ordered to be amortized over a four-year period. *Re Elwood Water Co. (Ind.)* 699.

10. The employment of three firms of attorneys and two firms of engineers was held to be excessive aid and expense in the preparation of a rate case by a telephone utility having a rate base of \$715,000. *Re Logansport Home Teleph. Co. (Ind.)* 714.

11. It was believed that any estimate of operating expenses by a natural gas utility to place its distribution line loss at a percentage in excess of $12\frac{1}{2}$ per cent was unreasonable. *Re Great Falls Gas Co. (Mont.)* 803.

12. The Commission in a rate proceeding of a distributing natural gas public utility is bound to proceed upon the assumption that the rates charged to a utility by a pipe line company, according to the terms of the supply contract, are not unreasonable, leaving such question for determination upon a proper proceeding. *Re Great Falls Gas Co. (Mont.)* 803.

13. A proposed distribution cost of a natural gas utility of \$0.06885 per thousand cubic feet was held to be unreasonable where the experience of another utility operating in a neighboring city within the same state but under more unfavorable field conditions, showed an average cost of \$0.0532 for the preceding five years; and a figure of \$0.055 was held to be a reasonable amount under such circumstances for that expense. *Re Great Falls Gas Co. (Mont.)* 803.

14. The proper method of including Federal income tax in the operating expenses of a utility is to include first the total tax in expenses and then deduct the amount of the resulting exemption from the fair return otherwise allowed. *Re Great Falls Gas Co. (Mont.)* 803.

15. Taxes actually paid by a public service corporation are a legitimate charge against operating costs, including Federal income taxes. *Re Clarksburg Light & Heat Co. (W. Va.)* 728.

III. Reasonableness.*a. In general.*

Denial of fair return as violation of Constitution, see CONSTITUTIONAL LAW, 6, 7.

Injunction against rate order on the ground of confiscation, see INJUNCTION.

16. The right of a utility to earn an adequate return on the fair value of its property is subject to the limitation that its affairs must be conducted in a reasonably efficient manner so as to earn the same if possible. *Re Lexington Water Co. (Mo.)* 322.

17. In establishing initial rates for a new territory to serve a city which compares favorably from an anticipated business viewpoint with another city in the same state and located under similar conditions, a utility cannot reasonably ignore the experience of the second city in the establishment and growth of such utility business, especially when the attitude of utility experts indicate that the company in actual construction has taken into account such experience. *Re Great Falls Gas Co. (Mont.)* 803.

P.U.R.1928E.

RETURN—*continued.*

18. The reasonableness of a rate of return is primarily a question of fact depending upon particular circumstances and situations as well as the current rate of interest. Cambridge Electric Light Co. v. Atwill (U. S. Dist. Ct.) 253.

b. Specific amounts allowed.

19. Rates calculated to yield a return of 7½ per cent on the fair value of gas properties were ordered in effect. Santa Barbara v. Southern Counties Gas Co. (Cal.) 767.

20. Rates yielding a return of approximately 6.51 per cent of the depreciated cost of physical telephone property were permitted to continue in effect. Re Illinois Bell Teleph. Co. (Ill.) 279.

21. An increase of telephone rates was authorized calculated to yield a return of approximately seven per cent on the total fair value of the utility. Re Decatur County Independent Teleph. Co. (Ind.) 1.

22. An increase of rates calculated to yield a return of approximately 7 per cent on the fair value of telephone properties was allowed. Re Argos Teleph. Co. (Ind.) 271.

23. An increase of rates calculated to yield 6 per cent on the fair value of water utility properties was allowed. Re Elwood Water Co. (Ind.) 699.

24. Increased rates were allowed calculated to yield a return in excess of 7 per cent for a telephone utility. Re Logansport Home Teleph. Co. (Ind.) 714.

25. A fare increase calculated to yield a return of approximately 7.14 per cent was held not to be excessive for a street railway company. Re United R. Co. (Mo.) 419.

26. An allowance of 8 per cent was made for annual return to a natural gas utility, less a proper sum to compensate the inclusion of Federal income tax as an operating expense. Re Great Falls Gas Co. (Mont.) 803.

27. Rates yielding a return of approximately eight per cent on the present value of telephone properties were held to be sufficient and a petition for an increase was refused. Re Rock Hill Teleph. Co. (S. C.) 221.

28. A street railway company upon purchasing another line showing a return of 1.68, 1.03, and 2.01 per cent for three successive years was permitted to increase fares in conformity with its own system, which showed returns of 5.07, 4.32, and 4.44 per cent during the same period where patrons all over the city would enjoy free inter-transfer privileges. Re Milwaukee Electric R. & Light Co. (Wis.) 15.

29. A return of 9.25 per cent of the book value of utility property was found to result from economical operation and profits made up from merchandising business and considerable deferred maintenance which would eventually have to be taken care of, and accordingly the rate although somewhat abnormal was not disapproved. Wauzeka Creamery Co. v. Wauzeka Light & P. Co. (Wis.) 158.

REVOCATION.

Revocation of certificate of convenience and necessity, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 13.

P.U.R.1928E.

REVOCATION—*continued.*

Commission power to revoke certificate, see **CERTIFICATES OF CONVENIENCE AND NECESSITY**, 16.

RIGHT OF WAY.

Treatment of, in valuation, see **VALUATION**, 70-75.

ROOM BASIS.

Room basis of electric rates, see **RATES**, 25.

RULES AND REGULATIONS.

Publication of telephone directories including classified business section as subject to rules of Commission, see **COMMISSIONS**, 5.

Rules and regulations governing service, see **SERVICE**, 33-36.

SALARIES AND WAGES.

Lack of Commission power to determine conditions upon which street railway's striking employees should return to work, see **COMMISSIONS**, 19.

As an operating expense, see **RETURN**, 6.

SALE.

See **CONSOLIDATION, MERGER, AND SALE**.

SCHEDULES.

Rate schedules generally, see **RATES**, 22.

Duty to inform Commission of departure from schedule, see **DISCRIMINATION**, 1.

SECURITY ISSUES.

Complaint of city seeking extension of exchange boundaries as not to be prejudiced by granting in another proceeding authorization to purchase stock of utility involved, see **CONSOLIDATION, MERGER, AND SALE**, 1.

Security issues as a measure of value for rate making, see **VALUATION**, 11, 12.

Purchase price of controlling stock as a charge to capital, see **VALUATION**, 41.

1. An issue of securities will not be permitted against an allowance for going concern value. Re Smith River Power Co. (Cal.) 96.

2. A security issue should be based upon the estimated historical cost of the properties, consideration being given to the depreciation of such properties and the earnings realized from the operation of the properties. Re Smith River Power Co. (Cal.) 96.

3. An application by a water company controlled by a municipal corporation to issue bonds as a private corporation was refused approval in view of the probability of the validity of such bonds being questioned. Re Petersburg Water Co. (Ind.) 47.

P.U.R.1928E.

SECURITY ISSUES—*continued.*

4. Securities proposed by an electric company guilty of irregular and improper methods of collecting connection charges were approved with reluctance in view of the great need of the public for immediate service. Re Rush County Power Co. (Ind.) 670.

5. The use of exhibits based upon market quotations as tests of the value of stock to be exchanged in a consolidation program between a gas and an electric company or of the value of assets thereby represented was held to be an inadequate basis in view of the foreign factors such as stability, money cost, rate of return, and hope of enhancement which are reflected in such quotations. Re Consolidated Gas Co. (N. Y.) 19.

6. Where the capital stock of one utility is purchased by another, any securities issued by the purchasing corporation should be substantially on the same basis that controlled the issue sought to be acquired. Re Consolidated Gas Co. (N. Y.) 19.

SERVICE.

I. Jurisdiction and powers of Commissions, 1-7.

II. Duty to serve, 8-12.

III. Extensions, 13-17.

IV. Abandonment and discontinuance, 18-30.

V. Substitution of service, 31, 32.

VI. Rules and regulations, 33-36.

VII. Particular utilities, 37-47.

a. Automobile, 37-39.

b. Railroad, 40, 41.

c. Street railway, 42.

d. Telephone, 43-46.

e. Water, 47.

Discrimination in service, see DISCRIMINATION.

Competitive service generally, see MONOPOLY AND COMPETITION.

Metered service generally, see RATES, 23, 24.

I. Jurisdiction and powers of Commissions.

Commission jurisdiction to determine whether or not consumer to whom service has been discontinued because of alleged unlawful diversion of current is guilty of such charge, see COMMISSIONS, 14.

Annotation on Commission jurisdiction, powers, and duties, p. 367.

1. It is not incumbent upon the Commission to determine whether or not a utility district has complied with all requirements of law in the organization of such districts. Re Truckee River Power Co. (Cal.) 83.

2. A Commission may command the restoration of a utility service which has been voluntarily and unwarrantedly discontinued by a company still exercising its charter rights. Re Androscoggin & K. R. Co. (Me.) 347.

3. The Commission is required to inquire into any neglect or violation of the state laws by any public utility including its duty to furnish safe, reasonable, and adequate facilities for public accommodation. Re Androscoggin & K. R. Co. (Me.) 347.

P.U.R.1928E.

SERVICE—continued.

4. The Commission has jurisdiction to require a railway utility to apply for consent and show cause why such consent should be given to any proposed discontinuance of a branch line. *Re Androscoggin & K. R. Co.* (Me.) 347.

5. The Commission is not inhibited from granting its consent to the discontinuance of service on an interurban railway line passing through several municipalities by the fact that the local authorities have not yet granted consent to such discontinuance, where the company is operating under a permissive and not a mandatory charter, and where there was no evidence of contractual relationship between the company and such municipalities, and where the officers of the latter had notice of, and were present at the Commission hearing without protest to the proposed action. *Re Androscoggin & K. R. Co.* (Me.) 347.

6. The law does not authorize the Board to order the installation of additional equipment or facilities by utilities such as the maintenance of a waiting room at a terminal unless the business and revenues incident thereto justify the expenditure for such purpose. *Re Public Service Coordinated Transport* (N. J.) 264.

7. The Commission has jurisdiction to require a utility to render service notwithstanding the default in the payments for installation of wiring by former owners, and a rule authorizing it to require cost of extension to be paid in advance. *Willow River Power Co. v. Railroad Commission* (Wis. Sup. Ct.) 108.

II. Duty to serve.

Damages for refusal of electric service, see **DAMAGES**, 1.

Annotation on duty to serve, p. 368.

8. An iron foundry, supplying itself and other consumers nearby with water from its own well, is not part of the "public" as far as concerns its right to insist upon connection with a utility's main for alleged fire protection where the supply may be used as "stand-by" service by the foundry to fulfill its contract with its own consumers, in view of its status as a competitor to the utility. *Rogers Iron Works Co. v. Joplin Water Works Co.* (Mo.) 260.

9. An iron foundry supplying itself and other consumers nearby with water from its own well is entitled to a meter connection from a utility's main only for the purpose of fire fighting since it has only the right of one public service corporation against another. *Rogers Iron Works Co. v. Joplin Water Works Co.* (Mo.) 260.

10. Such service [milling, stoppage, cleaning, mixing, and storing grain in transit] cannot be required of transportation companies without adequate compensation therefor. *State v. Great Northern R. Co.* (N. D. Sup. Ct.) 111.

11. Present owners of premises to which a utility has constructed its line and stands ready to serve are under no contractual obligation to pay for such installation as a condition of receiving service, notwithstanding a company rule authorizing it to require the cost of extensions to be paid in advance by customers, or the fact that previous owners had defaulted in the P.U.R.1928E.

SERVICE—*continued.*

payment of notes given therefor. *Willow River Power Co. v. Railroad Commission* (Wis. Sup. Ct.) 108.

12. Public service corporations may not, by their acts, disable themselves from performing functions which were to be rendered in consideration of their public grant. *Columbia R. Gas & E. Co. v. South Carolina* (U. S. C. C. A.) 235.

III. Extensions.

Certificate for extensions of present service or for inauguration of new service, see **CERTIFICATES OF CONVENIENCE AND NECESSITY**.

Requirement that company comply with provisions of National Electrical Safety Code before collecting for further extensions, see **ELECTRICITY**, 1. Responsibility of company to another company for money collected from patrons for connection of electric extensions, see **INTERCORPORATE RELATIONS**, 3.

Approval of securities proposed by electric company guilty of irregular and improper methods of collecting connection charges, see **SECURITY ISSUES**, 4.

13. A general order was made requiring any party desiring to construct or operate any electric property for public service to submit to the Commission for its approval a description of the entire project before attempting to collect money from prospective patrons for connection charges, or taking any other procedural steps. *Re Extensions of Electric Service* (Ind.) 517.

14. All extensions for service which are chargeable to the consumer should be installed at actual cost. *Re Rush County Power Co.* (Ind.) 670.

15. Testimony showing that cost of extensions to domestic consumers was excessive reaching as high as \$250 in special cases was received as evidence to show the reason for a limited number of subscribers as compared with other utilities in cities of similar size. *Re Elwood Water Co.* (Ind.) 699.

16. A company furnishing electric service may reasonably require, as a condition to extending service, that the patron defray construction costs which are not discriminatory. *Antisdel v. Macatawa Resort Co.* (Mich. Sup. Ct.) 606.

17. A telephone company was not required to invade the territory of a neighboring company in order to provide telephone service to a subscriber previously receiving its service at other premises, notwithstanding the fact that it was already serving other subscribers in that vicinity because of obligations assumed in the process of corporate consolidation. *Cale and Smith v. Jamestown Teleph. Corp.* (N. Y.) 276.

IV. Abandonment and discontinuance.

Commission jurisdiction over matters of abandonment, see *supra*, 2, 4, 5, 7. Bankruptcy and discontinuance of street railway service, see **BANKRUPTCY**. Judicial notice by Commission of location of certain city streets and of traffic conditions in petition for authority to abandon street car lines, see **COMMISSIONS**, 4.

P.U.R.1928E.

SERVICE—*continued.*

- Commission jurisdiction to determine whether or not consumer to whom service has been discontinued because of alleged unlawful diversion of current is guilty of such charge, see **COMMISSIONS**, 14.
- Evidence on complaint against discontinuance of spur track without Commission authority, see **EVIDENCE**, 1.
- Power of Commission to require evidence of probable expenditures required of railway for proposed resurfacing of city street and relaying of rails in passing upon petition for abandonment, see **EVIDENCE**, 4.
- Water company upon resuming service after justifiable discontinuance because of misrepresentation by patrons as not to make additional charge except sufficient to cover loss sustained, see **FINES AND PENALTIES**, 2.
- Discontinuance of service to enforce payment, see **PAYMENT**, 2.
- Authority to purchaser of portion of railroad to junk and remove ties, tracks, bridges, and other equipment, see **RAILROADS**, 2.
- Annotation on abandonment and discontinuance of service, p. 369.
- Annotation on inadequate return as affecting abandonment and discontinuance, p. 370.
- Annotation on improper action of patrons as affecting abandonment and discontinuance, p. 372.
18. A city should not be required to continue to rent a number of fire hydrants which have become unnecessary by reason of a reduction of population and property hazards, notwithstanding the fact that a discontinuance of such rentals might so lower the available return as to make necessary a rate increase. *Cripple Creek v. Cripple Creek Water Co.* (Colo.) 388.
19. The refusal of a public utility company to furnish service in any part of a territory in which an independent company, not a public utility, has entered cannot be justified, providing public convenience and necessity requires service therein. *Darnielle, Re* (Idaho) 211.
20. The granting of consent for such extreme measures as contemplated by a petition to abandon a portion of a city traction system must be made in the presence of detailed, definite, and cogent proof, and nothing should be left to intendment, conjecture, or forced inference. *Re Portland R. Co.* (Me.) 300.
21. The fact that a city contemplates the resurfacing of a street is not even inferential evidence of the city's desire that a Commission approve the removal of the rails and the abandonment of a traction system in such a street. *Re Portland R. Co.* (Me.) 300.
22. Before authorization of the abandonment of a portion of a city traction system is given, the necessity for such measures must be substantiated by evidence showing that all reasonable measures had been exhausted which might preserve rail service, and that there are no other lines less remunerative and less to be desired from a practically economic viewpoint. *Re Portland R. Co.* (Me.) 300.
23. A transportation utility must prove by cogent evidence facts which justify any termination of its former service, which it may propose. *Re Androscoggin & K. R. Co.* (Me.) 347.
24. A utility seeking to discontinue service should be compelled to ask P.U.R.1928E.



SERVICE—continued.

for permission before taking any action rather than place the burden of proof upon the public after such discontinuance to show cause why it should be restored. *Re Androscoggin & K. R. Co.* (Me.) 347.

25. A railway company was permitted to abandon a portion of its line upon which the traffic and revenue had steadily decreased so as not to permit of a fair return, and where the company was faced with an immediate and expensive reconstruction program if safe operations were to continue. *Re Androscoggin & K. R. Co.* (Me.) 347.

26. In no instance should service be discontinued because of a matter that is in dispute between the customer and the company, pending a determination of the controversy in the proper forum. *Parker v. St. Joseph Water Co.* (Mo.) 161.

27. An irregularity in domestic wiring previously used for a home generating plant and connected to utility service upon approval of the latter's inspector was held to be too obvious to have been installed in bad faith in view of the usual arrangement of such wiring in connection with the replaced system, and service discontinued upon its discovery was ordered to be resumed after correction of the irregularity and approximate compensation for the energy unknowingly diverted. *Boyd v. Union Electric Light & P. Co.* (Mo.) 266.

28. Service discontinued because of alleged diversion of current was ordered to be resumed where the charge was denied by the customer and where the company failed at a Commission hearing to substantiate such charge with any proof. *DeSalme v. Union Electric Light & P. Co.* (Mo.) 310.

29. A complaint against discontinuance of street railway service was dismissed for lack of jurisdiction where the utility showed that it was unable to operate its cars by reason of the failure of striking employees to return to work. *Citizens Committee of Summit Hill v. East Penn Electric Co.* (Pa.) 288.

30. The fact that the electric department of a company operating an electric plant and a street railway is operating at a profit is not a bar to the abandonment of a portion of the street railway being operated at a loss. *Re Northwestern Electric Service Co.* (Pa.) 764.

V. Substitution of service.

Annotation on substitution of service, p. 372.

31. A statute (Chap. 47, Special Laws 1927) empowering a street railway company to use motor vehicles within the limits of its corporate territory upon the approval of the Commission and consent of local authorities, was held to be merely permissive and to go no further than to authorize new service. *Re Portland R. Co.* (Me.) 300.

32. A change in the system of transportation from rail to bus service requires the presentation to the Commission of facts reasonably dispelling any doubt of the Commission's duty not to withhold such permission. *Re Portland R. Co.* (Me.) 300.

VI. Rules and regulations.

33. A resort company furnishing both light and water may not refuse the former service because of a violation by the patron of regulations re-P.U.R.1928E.

SERVICE—continued.

specting water service, which are shown to have no connection with the furnishing of light. *Antisdel v. Macatawa Resort Co.* (Mich. Sup. Ct.) 606.

34. A water company in construing a rule requiring more than one minimum charge where more than one premises are supplied through the same meter may reasonably interpret the word "premises" as being a building or portion of a building occupied by separate tenants or consumers, rather than the land, including the buildings thereon and the appurtenances thereto. *Parker v. St. Joseph Water Co.* (Mo.) 161.

35. A water company's rule permitting it to discontinue service to patrons charged with misrepresentation in their application for the same, or of wasting water, and providing for resumption of service after such discontinuance upon a payment of money to be determined by the company, was held to be unlawful and unreasonable, and was ordered either to be eliminated or modified. *Parker v. St. Joseph Water Co.* (Mo.) 161.

36. All public utility rules should be couched in plain language, the meaning clearly expressed, and should be applied justly and fairly. *Parker v. St. Joseph Water Co.* (Mo.) 161.

VII. Particular utilities.

Requirement that company comply with provisions of National Electrical Safety Code before collecting for further extensions, see **ELECTRICITY**, 1.

Annotation on electric service, p. 377.

Annotation on gas service, p. 377.

Discussion of the application of Boyle's or Mariotte's Law to the commercial standards of gas distribution, p. 814.

a. Automobile.

Certificates of convenience and necessity for motor carrier service, see **CERTIFICATES OF CONVENIENCE AND NECESSITY**.

Free transfer provision as not properly before Commission in proceeding relating to changes in existing route and transfer arrangements between bus and traction lines, see **PROCEDURE**, 1.

Annotation on automobile service, p. 374.

Annotation on unified transportation service, p. 374.

37. The use of passenger cars for large shipments of flour and other freight, requiring the shipments to be broken up into small portions was held to be inadequate, and additional service by motor truck was authorized. *Re Craig (Colo.)* 60.

38. Through service by motor busses was ordered on certain routes where local bus service did not meet public needs and where the route would not support more than one bus line operating in a given territory. *Re Chicago & J. Transp. Co. (Ill.)* 481.

39. It is in the public interest that through bus service should be furnished by the same companies which render local service. *Re Chicago & J. Transp. Co. (Ill.)* 481.

b. Railroad.

Absence of duty to render special services without adequate compensation, see *supra*, 10.
P.U.R.1928E.

SERVICE—continued.

Evidence on complaint against discontinuance of spur track without Commission authority, see **EVIDENCE**, 1.

Annotation on substitution of service at railroad stations, p. 373.

Annotation on railroad service, p. 378.

40. Public safety and adequate service are of primary importance in the rendition of public service and, although as between the two, the former is more important, they must be taken as interconnected elements in determining whether a railroad utility should be directed to use its funds for any particular improvement. *Hartford v. New York, N. H. & H. R. Co.* (Conn.) 556.

41. "Milling in transit," "stoppage in transit," "cleaning, mixing, and storing in transit," are lawful services which may be required from transportation companies under proper conditions, and are not mere privileges to be granted by transportation companies on their own volition. *State v. Great Northern R. Co.* (N. D. Sup. Ct.) 111.

c. Street railway.

Abandonment of street railway service, see *supra*, 20-25, 30.

Power of Commission to require evidence of probable expenditures required of railway for proposed resurfacing of city street and relaying of rails in passing upon petition for abandonment, see **EVIDENCE**, 4.

Free transfer provision as not properly before Commission in proceeding relating to changes in existing route and transfer arrangements between bus and traction lines, see **PROCEDURE**, 1.

Annotation on street railway service, p. 379.

42. The use of one-man safety cars on cross-town lines was held to be consistent with reasonably adequate and safe service. *Re Milwaukee Electric R. & Light Co.* (Wis.) 15.

d. Telephone.

Order fixing compensation for switching service between telephone companies as not to be reversed in the absence of evidence showing expense of rendering such service will be increased by amount in excess of provided compensation, see **APPEAL AND REVIEW**, 2.

Publication of telephone directories including classified business section as subject to rules of Commission, see **COMMISSIONS**, 5.

Commission jurisdiction over apportionment of expense of physical connection, see **COMMISSIONS**, 20.

Accidental errors in telephone directory listing as not basis for claim for unlawful discrimination, see **DISCRIMINATION**, 4.

Factors to be considered by Commission in determining whether free inter-exchange telephone service should be re-established, see **DISCRIMINATION**, 5.

Force of Commission order recognizing existence of free telephone service between certain points, see **ORDERS**, 1.

Annotation on telephone service, p. 380.

43. A telephone company was required to provide an additional circuit along a route between two different exchanges where existing facilities P.U.R.1928E. 59

SERVICE—continued.

were shown to be inadequate but the order was conditioned upon the action of the connecting company in installing a line to make connection with the circuit. *Polo Teleph. Co. v. DeKalb-Ogle Teleph. Co.* (Ill.) 696.

44. A complaint by telephone patrons that a utility permitted certain subscribers to hold country lines longer than five minutes was held not to indicate insufficient service where the alleged inconvenience arose through the fault of the patrons themselves. *Re Argos Teleph. Co.* (Ind.) 271.

45. A complaint by telephone subscribers that the utility operators did not keep a record of unanswered calls was held not to reflect an insufficiency of service because of the manifest impossibility of the proposed suggestion. *Re Argos Teleph. Co.* (Ind.) 271.

46. A complaint by telephone subscribers that operators were not diligent in attempting to procure answers on calls was held to be more or less unreasonable where it was shown that two operators handled approximately three thousand calls a day, and where the service in the main was shown to be constantly improving. *Re Argos Teleph. Co.* (Ind.) 271.

e. Water.

Duty to serve competitor, see *supra*, 8, 9.

Sample of water from company's main as evidence of poor quality, see *EVIDENCE*, 2.

Annotation on irrigation service, p. 377.

Annotation on water service, p. 382.

47. A resort company having a limited water supply may reasonably require prospective patrons to agree to sprinkling restriction. *Antisdel v. Macatawa Resort Co.* (Mich. Sup. Ct.) 606.

SOCKETS.

Connected load count of socket outlets under electric rate schedule, see *RATES*, 29.

SPARE EQUIPMENT.

Spare parts for street car system as stand-by equipment rather than part of materials and supplies, see *ACCOUNTING*, 1.

SPRINKLING.

Restrictions on sprinkling, see *SERVICE*, 47.

SPUR TRACKS.

Evidence on complaint against discontinuance of spur track without Commission authority, see *EVIDENCE*, 1.

STAND-BY EQUIPMENT.

Spare parts for street car system as stand-by equipment rather than part of materials and supplies, see *ACCOUNTING*, 1.

STATION-TO-STATION CALLS.

Apportionment on station-to-station theory, see *APPORTIONMENT*, 6.

STATUTES.

Evasion of statute by motor transportation company, see *CERTIFICATES OF CONVENIENCE AND NECESSITY*, 12.

P.U.R.1928E.

STATUTES—*continued.*

- Lack of Commission authority to determine wisdom of legislative act, see **COMMISSIONS**, 1.
- Commission powers as limited by statutory grant, see **COMMISSIONS**, 6.
- Maryland statutes as not substituting Commission for directors and officers of corporation in the management and operation of railroad, see **COMMISSIONS**, 9.
- Commission duty to take cognizance of all law applying to it, see **COMMISSIONS**, 13.
- Penal statute as not to deprive defendant of right to review and test its validity in criminal proceeding, see **CONSTITUTIONAL LAW**, 9.
- Application of statute granting Commission power to prescribe the uniform rates, see **RATES**, 11, 12.
- Denial of additional allowance for going value in view of statutory provision, see **VALUATION**, 67, 68.
1. Where the latest warehouse act did not repeal or modify provisions of previous legislative regulation of such utilities, proposals affecting the subject must be considered in the light of all existing legislation. Re Board of Trade Warehouse Corp. (Ill.) 65.

STOCKS.

See **SECURITY ISSUES**.

STORAGE.

See also **WAREHOUSES**.

Grain milling and storage in transit, see **SERVICE**, 41.

STREET RAILWAYS.

Spare parts for street car system as stand-by equipment rather than part of materials and supplies, see **ACCOUNTING**, 1.

Feeder bus system of street railways, see **AUTOMOBILES**, 3.

Bankruptcy and discontinuance of street railway service, see **BANKRUPTCY**.

Judicial notice by Commission of location of certain city streets and of traffic conditions in petition for authority to abandon street car lines, see **COMMISSIONS**, 4.

Lack of Commission jurisdiction to eliminate undue congestion on sidewalk in front of business houses caused by patrons waiting at terminal of street railway, see **COMMISSIONS**, 17.

Lack of Commission power to determine conditions upon which street railway's striking employees should return to work, see **COMMISSIONS**, 19.

Allowance for depreciation of various utilities, see **DEPRECIATION**, 16-26.

Higher fare for return trip because of transfer agreement as not unjustifiably discriminatory, see **DISCRIMINATION**, 9.

Order that street railway obey ordinance requiring raising of tracks to conform with level of street or have its indeterminate permit revoked, see **FRANCHISES**, 2.

Free transfer provision as not properly before Commission in proceeding relating to changes in existing route and transfer arrangements between bus and traction lines, see **PROCEDURE**, 1.

STREET RAILWAYS—*continued.*

- Street railway as subject to governmental regulation, see **PUBLIC UTILITIES**, 8.
- Right of street railway to reasonable return irrespective of attitude of competing company, see **RATES**, 18.
- Street railway rates, see **RATES**, 32.
- Specific amounts allowed for return of public utility companies, see **RETURN**, 19-29.
- Board as not authorized to order installation of additional equipment or facilities such as maintenance of waiting room at terminal unless revenues justify expense, see **SERVICE**, 6.
- Abandonment of street railway service, see **SERVICE**, 20-25, 30.
- Street railway service generally, see **SERVICE**, 42.
- Allowances for right of way, see **VALUATION**, 70-75.

Statement that a railway company cannot be expected to lose increasing amounts of money in order to furnish service to comparatively few people who still require it when larger numbers of its former patrons have abandoned it for other means of transportation, p. 766.

1. Financial embarrassment of a street railway company was held to be no defense to an ordinance declared reasonable by the Commission which required the company to raise its tracks to conform with a new level in a street which was to be repaved by the city. *Hammond v. Hammond, W. & E. C. R. Co. (Ind.)* 577.
2. The Commission will assume that the municipal officers will deal fairly with a street railway company in the matter of resurfacing a street, with resulting financial burdens. *Re Portland R. Co. (Me.)* 300.
3. Railroad properties to be leased to private business concerns were held not to be within a provision of a zoning act exempting from zoning restrictions property of a public service corporation necessary for public convenience and welfare. *Re New York, N. H. & H. R. Co. (Mass.)* 863.

STRIKES.

- Lack of Commission power to determine conditions upon which street railway's striking employees should return to work, see **COMMISSIONS**, 19.
- Employees' strike as affecting discontinuance of service, see **SERVICE**, 29.

SUBSIDIARIES.

- Operation of motor vehicles by railroads and their subsidiaries, see **AUTOMOBILES**, 2.

SUBSTITUTION OF SERVICE.

- Substitution of service generally, see **SERVICE**, 31, 32.

SUBURBAN TERRITORY.

- Uniform electric rates in city and suburban areas, see **RATES**, 13.

SUPERINTENDENCE.

- Treatment of overheads in valuation, see **VALUATION**, 20-36.
P.U.R.1928E.

SUPERSEDED PROPERTY.

Allowance for amortization of gas generating plant rendered nonoperative by substitution of natural gas supply, see RETURN, 4, 5.

SUPERVISION.

Treatment of overheads in valuation, see VALUATION, 20-36.

SWITCHING SERVICE.

Order fixing compensation for switching service between telephone companies as not to be reversed in the absence of evidence showing expense of rendering such service will be increased by amount in excess of provided compensation, see APPEAL AND REVIEW, 2.

Effect of statutory prohibition against discrimination by telephone companies, see DISCRIMINATION, 8.

TABLES.

Use of life tables in determining depreciation of water pipes, see DEPRECIATION, 5.

TANGIBLE PROPERTY.

Valuation of, see VALUATION, 42-54.

TAXES AND TAXATION.

Power of state to relieve utility from gross receipts tax provision of municipal ordinance, see COMMISSIONS, 15.

Relief of natural gas utility from payment of gross receipts tax under franchise provision, see FRANCHISES, 3.

Federal income tax as an operating expense, see RETURN, 14, 15.

Tax assessments as evidence of value for rate making, see VALUATION, 11, 12.

Valuation for tax purposes as a measure of value for rate making, see VALUATION, 16.

TAXES DURING CONSTRUCTION.

Treatment of overheads in valuation, see VALUATION, 20-36.

TELEPHONES.

Order fixing compensation for switching service between telephone companies as not to be reversed in the absence of evidence showing expense of rendering such service will be increased by amount in excess of provided compensation, see APPEAL AND REVIEW, 2.

Apportionment questions generally, see APPORTIONMENT.

Publication of telephone directories including classified business section as subject to rules of Commission, see COMMISSIONS, 5.

Jurisdiction of Commission over telephone companies, see COMMISSIONS, 16.

Commission jurisdiction over apportionment of expense of physical connection, see COMMISSIONS, 20.

Complaint of city seeking extension of exchange boundaries as not to be prejudiced by granting in another proceeding authorization to purchase stock of utility involved, see CONSOLIDATION, MERGER, AND SALE, 1.

TELEPHONES—*continued.*

- Allowance for depreciation of various utilities, see **DEPRECIATION**, 16-26.
 Accidental errors in telephone directory listing as not basis for claim for unlawful discrimination, see **DISCRIMINATION**, 4.
 Factors to be considered by Commission in determining whether free interexchange telephone service should be re-established, see **DISCRIMINATION**, 5.
 Effect of statutory prohibition against discrimination by telephone companies, see **DISCRIMINATION**, 8.
 Questions of competition generally, see **MONOPOLY AND COMPETITION**.
 Force of Commission order recognizing existence of free telephone service between certain points, see **ORDERS**, 1.
 Telephone companies as common carriers, see **PUBLIC UTILITIES**, 4.
 Telephone rates, see **RATES**, 33-35.
 Revenues and expenses of telephone directories, see **RETURN**, 2.
 Specific amounts allowed for return of public utility companies, see **RETURN**, 19-29.
 Telephone company as not required to invade territory of neighboring company, see **SERVICE**, 17.
 Telephone service generally, see **SERVICE**, 43-46.
 1. A telephone exchange of a community near by another community but separated from the latter for over twenty years at the wishes of its representatives, was not permitted to be merged into the neighboring system where two popular referendums revealed a majority of subscribers opposed to the change, which would result in increased rates for its subscribers of both exchanges. *Re MacDonald* (Mass.) 789.

THEFT.

- Commission jurisdiction to determine whether or not consumer to whom service has been discontinued because of alleged unlawful diversion of current is guilty of such charge, see **COMMISSIONS**, 14.

THROUGH SERVICE.

- Automobile service generally, see **SERVICE**, 37-39.

TRACKS.

- Commission, in passing upon proposed relocation of track by interstate railroad, as lacking authority to compel relocation at grade which in the judgment of the company will hamper efficiency, see **COMMISSIONS**, 7.

Fact that railroad is required to secure consent of Commission to relocation of track as not warranting arbitrary withholding of approval for benefit of private property holders, see **COMMISSIONS**, 10.

Relocation of railroad tracks, see **RAILROADS**, 1.

Overhead railroad clearance required under statute, see **RAILROADS**, 3.

TRAFFIC.

- Judicial notice by Commission of location of certain city streets and of traffic conditions in petition for authority to abandon street car lines, see **COMMISSIONS**, 4.

P.U.R.1928E.

TRAFFIC—*continued.*

Elimination of grade crossings to avoid obstruction of traffic, see CROSSINGS, 1.

TRANSMISSION LINES.

Requirement that company comply with provisions of National Electrical Safety Code before collecting for further extensions, see ELECTRICITY, 1.

UNIFORM RATES.

Application of statute granting Commission power to prescribe uniform rates, see RATES, 11, 12.

Uniform electric rates in city and suburban areas, see RATES, 13.

Right of street railway to reasonable return irrespective of attitude of competing company, see RATES, 18.

UNIT COSTS.

Methods and measures used in determining value generally, see VALUATION, 3-10.

UNUSED PROPERTY.

Valuation of tangible property generally, see VALUATION, 42-48.

Nonoperating land as not a part of traction right of way for rate-making purposes, see VALUATION, 71.

Denial of return on property advertised for sale by utility company, see VALUATION, 75.

VACANT PREMISES.

Application of minimum charge to vacant premises, see RATES, 39.

VALUATION.

- I. In general, 1, 2.
- II. Methods and measures used in determining value, 3-16.
 - a. In general, 3-10.
 - b. Measures of value for rate making, 11-16.
- III. Accrued depreciation, 17-19.
- IV. Nonphysical elements affecting value, 20-40.
 - a. Overheads, 20-36.
 - b. Financing costs, 37-40.
- V. Miscellaneous charges to capital, 41.
- VI. Tangible property, 42-54.
 - a. In general, 42-48.
 - b. Working capital, 49-54.
- VII. Intangible property, 55-75.
 - a. Franchises, 55.
 - b. Going value, 56-68.
 - c. Leases and leaseholds, 69.
 - d. Rights of way, 70-75.

I. In general.

Expert's testimony of intangible values, see EVIDENCE, 3.
P.U.R.1928E.

VALUATION—continued.

Evidence as to market value of utility property which is merely cumulative of like evidence introduced in original proceedings as objectionable, see EVIDENCE, 10.

Ordering of reduction in electric rates upon satisfactory evidence pending opportunity for final valuation of property, see RATES, 3.

1. Fair value was, according to law, defined to mean a value, the rate of return from which, will be fair and reasonable to owners as well as patrons of such utility as a base upon which to pay rates for service, giving equal consideration to what the service is worth to the patrons and what the property is worth to the owners. Re Decatur County Independent Teleph. Co. (Ind.) 1.

2. A motion for a rehearing of a telephone rate proceeding by a city was granted where the rates had been fixed by an agreed valuation without actual estimate. Re Martinsville Teleph. Co. (Ind.) 553.

II. Methods and measures used in determining value.**a. In general.**

3. An estimate of unit costs by comparisons with construction of companies in various states and in Canada was held to be less reliable than an estimate of the Commission's engineer based on the experience of companies of similar size operating under similar conditions within the same state. Re Logansport Home Teleph. Co. (Ind.) 714.

4. An estimate of value for rate-making proceedings of a street railway company was adopted which used an original cost, agreed upon by all parties as of a certain date, and applying cost index numbers reflecting the ratio of costs. Re United R. Co. (Mo.) 419.

5. The use of a utility's cost index numbers was held to reflect more accurately the cost of property than other indexes taken from trade publications in view of the fact that they were prepared from actual costs to the company. Re United R. Co. (Mo.) 419.

6. Utility properties in terms of 1913 dollars were estimated in terms of 1927 currency by finding the ratio of the dollar during the latter period at 167 as compared to the dollar of 1913. Re United R. Co. (Mo.) 419.

7. In computing a reproduction cost, overhead costs on a portion of utility property at book figures and on the remainder by estimate is not permissible. Re United R. Co. (Mo.) 419.

8. The Commission attempted to fix a value for rate making that would keep the car rider from seeking some other means of transportation and at the same time give the company a return as nearly just as possible and still keep customers. Re United R. Co. (Mo.) 419.

9. A base valuation on the physical properties of an electric company by a utility's engineer excluding overheads was accepted as correct where the total was less than the amount reached by the Commission's engineer. Re Union Electric Co. (Mont.) 396.

10. Price index curve was held to be evidence of no value whatever in ascertaining original cost in view of the reflection in such curve of any abnormal activity of any commodity in any market at any time during the period covered, which could not possibly enter or influence the cost of the particular utility plant. Re Rock Hill Teleph. Co. (S. C.) 221.
P.U.R. 1928E.

VALUATION—*continued.****b. Measures of value for rate making.***

Statement that if appraisal of cost to reproduce has great influence in determining fair value, the difference between it and fair value should not be great, p. 8.

11. Where the actual value of utility property indicated by comparisons with tax assessments is in substantial agreement with such value indicated by the value of stock and outstanding securities, the composite figure thus attained may be regarded by the Commission as evidence of fair value though not controlling for rate-making purposes. *Re Decatur County Independent Teleph. Co. (Ind.) 1.*

12. It was held that the determination of fair value of utility property should be based in part upon the prices paid for common stock, in part upon tax appraisals, in part upon invested capital account, and in part upon engineering appraisals especially where estimates of reproduction cost by engineers differed so widely and often as to impair Commission confidence in their reliability. *Re Decatur County Independent Teleph. Co. (Ind.) 1.*

13. The Commission gave consideration to the cost of reproducing telephone properties at prices for materials and labor prevailing at the time of the inquiry, less depreciation, with such weight as might appear proper to other evidence concerning the value of the property. *Re Logansport Home Teleph. Co. (Ind.) 714.*

14. Original cost of utility property should be included in the considerations affecting fair value and rates. *Re Lexington Water Co. (Mo.) 322.*

15. Stress should not be placed on either the original or reproduction cost of utility property in ascertaining the fair value of the same. *Re United R. Co. (Mo.) 419.*

16. A valuation for tax purposes claimed by an electric utility was disregarded by the Commission in a valuation for rate-making purposes. *Re Union Electric Co. (Mont.) 396.*

III. Accrued depreciation.

Determination of accrued depreciation, see **DEPRECIATION, 13-15.**

17. Retired property of a utility that has an overhead construction cost included in its original cost must carry such overhead costs along with its retirement. *Re United R. Co. (Mo.) 419.*

18. No deduction should be made from an original cost appraisal for any balance that may be in the depreciation reserve of a utility company. *Re United R. Co. (Mo.) 419.*

19. When unexhausted property has been rendered useless by a sudden discovery or industrial improvement, the utility should be permitted to treat the superseded property as unusual obsolescence to be amortized out of earnings, or the value of the patent, new process, or contract should be determined and capitalized as a part of the rate basis. *Re Great Falls Gas Co. (Mont.) 803.*

IV. Nonphysical elements affecting value.***a. Overheads.***

Exclusion of organization and franchise items in making up depreciable property, see **DEPRECIATION, 4.**

P.U.R.1928E.

VALUATION—continued.

20. Overhead construction costs were not permitted to be reproduced in a valuation appraisal where the construction was actually done from time to time, and two-thirds of the amount had probably never been expended, or were already taken care of in annual operating expenses such as taxes, supervision, and interest during construction. Re Decatur County Independent Teleph. Co. (Ind.) 1.

21. No allowance was made for general construction costs including engineering, general supervision, legal aid, taxes, and other expenses of a plant which was constructed by contract according to a plan without precedent and the sole work of the chief promoter of the enterprise. Re Rush County Power Co. (Ind.) 670.

22. An allowance of approximately fifteen per cent for structural overheads was made in the reproduction cost valuation of telephone utility property. Re Logansport Home Teleph. Co. (Ind.) 714.

23. Utility property added since a previous valuation by the Commission should be included in the finding of fair value for subsequent rate proceedings, along with overhead construction costs actually incurred. Re United R. Co. (Mo.) 419.

24. An allowance of 5 per cent was made to cover construction overhead costs of various additions to street railway property. Re United R. Co. (Mo.) 419.

25. An allowance of 17½ per cent on physical utility property other than land, was permitted for construction overhead costs including cost of promotion. Re United R. Co. (Mo.) 419.

26. An allowance of 5 per cent was made for engineering and superintendence in obtaining the reproduction estimate of an electric utility. Re Union Electric Co. (Mont.) 396.

27. An allowance of 4 per cent overhead was made for interest during construction in the reproduction estimate of an electric utility. Re Union Electric Co. (Mont.) 396.

28. An allowance of 2 per cent was made as the overhead cost for omissions and contingencies in reproducing an electric plant for rate-making purposes. Re Union Electric Co. (Mont.) 396.

29. An allowance of 1 per cent was made as the overhead cost of insurance during construction to obtain the reproduction cost of an electric utility. Re Union Electric Co. (Mont.) 396.

30. An allowance of 3 per cent was made as the overhead cost of organization and legal expense during construction to obtain the reproduction estimate of an electric utility. Re Union Electric Co. (Mont.) 396.

31. No allowance is made in obtaining a reproduction estimate of an electric utility for taxes during construction where the property sought to be valued could be reproduced within the period of a year between the annual tax due dates. Re Union Electric Co. (Mont.) 396.

32. A special allowance of 1.5 per cent was permitted for hauling material and maintaining labor camps during construction of a plant so remotely situated that such expenses were necessary in the reproduction cost. Re Union Electric Co. (Mont.) 396.

33. All proper costs during construction should be grouped under an P.U.R.1928E.

VALUATION—*continued.*

allowance for overhead costs in a reproduction appraisal of utility property. *Re Union Electric Co. (Mont.)* 396.

34. No allowance was made in the overhead construction cost for the expense of securing a certificate which was unnecessary for the lawful operation of the utility valued. *Re Union Electric Co. (Mont.)* 396.

35. Promotion fees were not allowed in valuing the overhead construction cost of a utility, because of their conjectural and speculative nature. *Re Union Electric Co. (Mont.)* 396.

36. Interest upon borrowed money cannot be capitalized in the rate base. *Re Rock Hill Teleph. Co. (S. C.)* 221.

b. *Financing costs.*

37. The cost of financing and acquisition by present stockholders of a water utility was not permitted to be included in a rate base. *Re Elwood Water Co. (Ind.)* 699.

38. Bond discount and commissions, in so far as they are part of interest during construction, are properly chargeable to capital account, but beyond that, the cost of financing, promoting, or assembling capital should not be included in a valuation for rate-making purposes. *Re United R. Co. (Mo.)* 419.

39. Inclusion of bond discount in the estimated rate base of a public service corporation is erroneous. *Re Great Falls Gas Co. (Mont.)* 803.

40. A proposed allowance of 10 per cent of the value of a natural gas utility property for cost of financing was eliminated from the rate base as an improper item. *Re Great Falls Gas Co. (Mont.)* 803.

V. *Miscellaneous charges to capital.*

41. The authorization of a purchase of the controlling stock in one utility by another does not determine the amount of such purchase price which may be charged to fixed capital accounts at such certain time as the properties may be acquired. *Re Pacific Teleph. & Teleg. Co. (Cal.)* 80.

VI. *Tangible property.***a. *In general.***

Denial of return on property advertised for sale by utility company, see *infra*, 75.

42. A gas transmission line from a field compressor station which would not become entirely nonoperative upon the depletion of a natural gas supply was included in the rate base, rather than as an element in the cost of gas. *Santa Barbara v. Southern Counties Gas Co. (Cal.)* 767.

43. The value of services assigned to a water company by patrons who paid for them was excluded from the rate base of such utility, in view of representations made by the company in securing such assignment, that their value would not be so included in the capital account for rate-making purposes. *Re Elwood Water Co. (Ind.)* 699.

44. The value of two residences, one of which had been sold and the other unoccupied, was excluded from the appraisal of a water utility's property. *Re Elwood Water Co. (Ind.)* 699.

45. The value of a railroad switch owned and controlled by a railroad P.U.R.1928E.

VALUATION—*continued.*

new less depreciation and the items of organization and other pioneer expenses have been included in a general allowance for overhead construction cost. *Re Great Falls Gas Co. (Mont.) 803.*

67. A valuation of a telephone utility which failed to make any allowance for going concern value was held upon appeal to be correct where all the other elements enumerated by a statute, which did not specify such allowance, were given proper consideration. *Columbia River Teleph. Co. v. Department of Public Works (Wash. Sup. Ct.) 520.*

68. A previous unanimous decision of the court, holding in a rate fixing proceeding that the department need not allow any value for going concern by virtue of a state statute, was held to be controlling in the determination of whether or not such an allowance was necessary in a general valuation proceeding. *Columbia River Teleph. Co. v. Department of Public Works (Wash. Sup. Ct.) 520.*

c. Leases and leasesholds.

69. The ratepayers should not be compelled to pay a return upon the difference between a so-called favorable lease by the utility and an alleged fair rental on the property at prevailing prices. *Re Logansport Home Teleph. Co. (Ind.) 714.*

d. Rights of way.

70. A method of valuing traction right of way by a city assigning to such portions adjoining rear ends of property, the average value for the rear portion of the lot and to portions adjoining the front end the average value for lots so situated was held to be more accurate and justifiable than the company's method in applying to its right-of-way holding, the average unit values indicated by general appraisal figures of similarly situated adjoining and contiguous land. *Re United R. Co. (Mo.) 419.*

71. Nonoperating land must be excluded from operating land in valuing traction right of way for rate-making purposes. *Re United R. Co. (Mo.) 419.*

72. It is improper to assess average lot values to a street railway's right of ways which are separated from the adjoining properties by alleys or steam railroad rights of way. *Re United R. Co. (Mo.) 419.*

73. The assumption of average sized lots to which shall be applied front foot values of lots varying in depth, was held to be a highly improper basis in determining the value of street railway right of way. *Re United R. Co. (Mo.) 419.*

74. The selling price of a contiguous lot acquired for some special purpose is not a correct measure of the value of traction right of way. *Re United R. Co. (Mo.) 419.*

75. The car-riding public should not be obliged to pay a return on property that is known to be unused at the time of the rate fixing, and property which has been advertised for sale by the company at such period will accordingly be assumed to be nonoperating property. *Re United R. Co. (Mo.) 419.*

VESSELS.

Allowance for depreciation of various utilities, see DEPRECIATION, 16-26.
F.U.R.1928E.

VOTING.

Concurrence by Commissioners in approval of utility consolidation to avoid tie vote where deciding Commissioner is absent because of illness, see COMMISSIONS, 18.

WAIVER.

Authority to exercise franchise powers given in ordinance which also specifies rates to be charged upon condition that utility waive any rights to charge such rates without approval of Commission, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 2.

WAREHOUSES.

Plan for grain monopoly as inconsistent with public policy established by Illinois Constitution, see CONSTITUTIONAL LAW, 1.

Discriminatory nature of plan permitting lessors of warehouse space to reserve privileges for grain upon mere statement while other persons are required to tender grain before storage space could be demanded, see DISCRIMINATION, 2.

Illegal preference resulting from plan for regulation of grain storage which will permit certain group of dealers to obtain information unavailable to the public, concerning the amount of space vacant, see DISCRIMINATION, 3.

Liberal construction of statute in favor of public, disregarding corporate fiction, where unlawful monopolistic result is found to exist by use of device which gives control over use of public space to those who admittedly own the grain stored therein, see INTERCORPORATE RELATIONS, 1.

Questions of competition generally, see MONOPOLY AND COMPETITION.

State-owned mill and elevator, together with equipment, trackage, and facilities as public terminal grain elevator and subject to regulation, see PUBLIC UTILITIES, 5.

Legislation not repealed by subsequent laws relating to warehouses, see STATUTES, 1.

1. A proposed plan permitting lessors of warehouse space to exercise optional rights over the amount of storage space available for their own future use and making the public demand subject to such option, was held to be a violation of a statute requiring warehouses to publish at specific periods detailed information for the public concerning the amount of storage space available for public use. Re Board of Trade Warehouse Corp. (Ill.) 65.

WASHINGTON.

Denial of additional allowance for going value in view of statutory provision, see VALUATION, 67, 68.

WASTE.

Discontinuance of service because of misrepresentation in application or for wasting water, see SERVICE, 35.

P.U.R.1928E.

WATER.

Apportionment questions generally, see APPORTIONMENT.

Use of life tables in determining depreciation of water pipes, see DEPRECIATION, 5.

Allowance for depreciation of various utilities, see DEPRECIATION, 16-26.

Free service to municipality as discrimination, see DISCRIMINATION, 6.

Special rate for large consumers as discriminatory, see DISCRIMINATION, 7.

Sample of water from company's main as evidence of poor quality, see EVIDENCE, 2.

Excessive production costs in one city as indication of obsolete pumping equipment, low load factor, and possibility of more economical administration, see EVIDENCE, 5.

Water company upon resuming service after justifiable discontinuance because of misrepresentation by patrons as not to make additional charge except sufficient to cover loss sustained, see FINES AND PENALTIES, 2.

Water rates, see RATES, 36-42.

Specific amounts allowed for return of public utility companies, see RETURN, 19-29.

Refusal of light for violation of water regulation, see SERVICE, 33.

Discontinuance of service because of misrepresentation in application or for wasting water, see SERVICE, 35.

Water service generally, see SERVICE, 47.

WATER POWER.

Objection that size of proposed merger will permit domination of water power as not a bar to consolidation, see CONSOLIDATION, MERGER, AND SALE, 8.

WHOLESALE COMPANY.

Whether pipe line company supplying wholesale gas to distributing corporation is a public utility as not an issue in rate proceedings of distributing company, see PUBLIC UTILITIES, 3.

WIRES AND CABLES.

Requirement that company comply with provisions of National Electrical Safety Code before collecting for further extensions, see ELECTRICITY, 1.

WORKING CAPITAL.

Treatment of, in valuation, see VALUATION, 49-54.

WRIGHT DEMAND RATE.

Wright demand form of electric rate schedule, see RATES, 30.

ZONES.

Fare zones on street railway, see RATES, 32.

ZONING RESTRICTIONS.

Railroad properties to be leased to private business concerns as not within provision of zoning act exempting public service corporations, see STREET RAILWAYS, 3.

P.U.R.1928E.

